Supreme Court, U.S.
FILED

No. 09-518 JUN 10 2010

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# In The Supreme Court of the United States

WARREN HAVENS, VERDE SYSTEMS, LLC; ENVIRONMENTEL, LLC; INTELLIGENT TRANSPORTATION & MONITORING WIRELESS, LLC and TELESAURUS HOLDINGS GB, LLC,

*Petitioners,*

v.

MOBEX NETWORK SERVICES, LLC; MARITIME COMMUNICATIONS/LAND MOBILE, LLC and PAGING SYSTEMS, INC.,

*Respondents.*

**On Petition For A Writ Of Certiorari To The California Court Of Appeal**

## PETITION FOR A WRIT OF CERTIORARI

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June 10, 2010

## QUESTIONS PRESENTED

Respondents are FCC licensees operating in California regulated under the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (the "FCA") and California state law. Petitioners allege that Respondents have competed unfairly under California state law by making misrepresentations to Petitioners and others and by tortiously interfering with Petitioners' business relations. The Court of Appeal below found that all of these claims are preempted by the FCA's preemption clause 47 U.S.C. § 332(c)(3)(A), which provides that:

> no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.

The questions presented are:

1. Under 47 U.S.C. § 332(c)(3)(A), are any or all state-law claims for damages, arising out of fraud, tortious interference with contractual relations and unfair competition, which are in some way associated with an FCC-issued license, state "regulation" of rates and market entry?

2. Assuming that under 47 U.S.C. § 332(c)(3)(A) state-law claims for damages in some way associated with an FCC-issued license may be

state "regulation" of rates and market entry, is preemption limited to only those claims that directly affect the regulation of rates and market entry?

3. Does the Federal Communications Act's savings clause for actions arising under antitrust law, 47 U.S.C. § 152 note, apply to claims under both state and federal antitrust law?

## CORPORATE DISCLOSURE STATEMENT

The following are parent corporations of the Petitioners: None.

No publically-held company owns more than 10% of the stock of any of the Petitioners.

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## INTRODUCTION

Petitioners respectfully petition this Court for a writ of certiorari to review a decision by the California Court of Appeal holding that Petitioners' state-law claims are preempted by 47 U.S.C. §332(c)(3)(A). This petition presents the question of whether all state-law claims for damages in any way associated with an FCC-issued license (including claims arising out of misrepresentations and deliberate nondisclosures) are preempted. This petition also presents the subsidiary question of whether the Federal Communications Act's savings clause for actions arising under antitrust law, 47 U.S.C. § 152 note, applies to claims under antitrust statutes.

There is an "assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Altria Group, Inc. v. Good*, 129 S. Ct. 538, 543 (2008); (*quoting Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). In light of this "presumption against preemption" "Congress' intent to preempt must be clear and manifest to preempt state law in a field traditionally occupied by the states." *Wyeth v. Levine*, 129 S. Ct. 1187, 1195 (2009); *Cipollone v. Liggett Group*, 505 U.S. 504, 518, 522-23 (1992); *see also Altria Group*, 129 S. Ct. at 543; ("[W]hen the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption'") (*quoting Bates v. Dow Agrosciences LLC*, 544 U.S. 431 (2005).

There is a conflict among appellate courts regarding the extent to which state-law claims against FCC licensees stemming from misrepresentations are preempted by §332(c)(3)(A). This Court should grant review to resolve the conflict.

## OPINIONS BELOW

The opinion of the trial court was unreported and is reproduced in the Appendix at App. 40-83. The opinion of the Court of Appeal affirming the trial court is reported at 2009 Cal. App. Unpub. LEXIS 7694 (Cal. App. 1st Dist. Sept. 25, 2009) and is reproduced in the Appendix at App. 1-39. The decision of the California Supreme Court denying further review is unreported and is reproduced in the Appendix at App. 91.

## JURISDICTION

The judgment of the Court of Appeal affirming dismissal of all of Petitioners' claims was entered on September 25, 2009. On October 13, 2009, Petitioners filed a Petition for Rehearing with the Court of Appeal. The time period in which the Court of Appeal could have granted the Petition for Rehearing expired on October 26, 2009. On November 9, 2009, Petitioners filed a Petition for Review to the California Supreme Court. On January 13, 2010, the Supreme Court of California denied review. On April 1, 2010, this Court extended the time period for Petitioners to file their Petition for Writ of Certiorari until and including June 11,

2010. This Court has jurisdiction under 28 U.S.C. §1257.

## STATUTES INVOLVED

47 U.S.C. § 332(c)(3)(A), the FCA's preemption provision, provides in relevant part:

> [N]o State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.

47 U.S.C. § 414 provides:

> Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.

47 U.S.C. § 152 note provides

> [N]othing in this Act [see Short Title of 1996 Amendment note set out under section 609 of this title] or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws.

## STATEMENT OF THE CASE

### A. Facts Giving Rise To The Dispute

Petitioner Warren Havens' principal occupation has been obtaining licenses issued by the Federal Communications Commission ("FCC") and developing wireless communications services (App. at 99). His companies include the other Petitioners in this case.[1] Together, Petitioners have obtained and used FCC licenses principally for providing advanced wireless services within the Location and Monitoring Service and Automated Maritime Telecommunications System ("AMTS") frequency spectrums (App. at 99-100. Such licenses are issued via public auctions and authorize the licensee to construct and operate wireless stations in a defined area (App. at 110).

Respondents include Petitioners' competitor, Mobex Network Services, LLC ("Mobex") and its affiliates. Respondents have been granted AMTS licenses for large portions of the United States (App. at 101-107. They have interfered substantially with Petitioners' business by making specific misrepresentations regarding title to and encumbrances on FCC licenses to individuals and entities contracting with Petitioners (App. at 114-115).

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[1] At the time of the relevant proceedings before the trial court and the Court of Appeal, Petitioner Verde Systems, LLC was known as Telesaurus VPC, LLC and Petitioner Environmentel, LLC was known as AMTS Consortium, LLC.

The FCC issues "geographic" and "site-based" licenses. The former category encompasses licenses for a large geographic area in which the licensee can locate many fixed antenna. The latter category encompasses licenses for a specific fixed antenna site, with a service area within the surrounding geographic license area. When a site-based license is revoked, terminated or canceled, it "reverts"; that is, the radio spectrum of the license automatically becomes part of the surrounding geographic license. Respondents are holders of both "site-based" and "geographic" licenses.

FCC rules mandate that when an AMTS license is issued, the associated component wireless stations must be constructed, and operations commenced, within two years of obtaining the license (App. at 118).[2] The rules also provide that if a licensee fails to construct a station within the construction period, the license for the station terminates automatically without any further FCC action (App. at 118).[3] In this event, the erstwhile licensee is required to notify the FCC of the license's termination so that the FCC can delete the license from its public license database, known as the Universal Licensing Service ("ULS") (App. at 118). This public disclosure is crucial because the ULS is the primary source relied on by parties who are considering whether to bid on licenses in spectrum auctions (App. at 118).

[2] 47 C.F.R. § 80.49.

[3] 47 C.F.R. §§ 1.946, § 1.955.

If a licensed station is terminated and the termination is properly disclosed in compliance with FCC rules, then the AMTS and its associated service territory automatically reverts to the geographic license covering that region (App. at 122-123). By contrast, if disclosure does not occur, "spectrum hoarding" and "warehousing" results (App. at 119-120). These terms refer to situations where entities pretend to own and operate licenses that have terminated just to prevent competitors from doing so (App. at 110).

In this case, Respondents hoarded and warehoused automatically-terminated licenses by failing to construct stations within the periods mandated by the FCC and, thereafter, by failing to surrender the licenses to the FCC for cancellation (App. at 119-124). Moreover, Respondents made specific misrepresentations to the Petitioners that their component stations had been constructed by the FCC-mandated deadline, when in fact they had not (App. at 141-153). Respondents made these misrepresentations knowing that Petitioners would rely on them and would refrain from applying to the FCC for the AMTS spectrum in such station licenses.

Similarly, Respondents falsely reported to the FCC in "activation notices" that their stations were timely constructed to forestall the FCC's cancellation of the licenses associated with these non-existent stations (App. at 143). This scheme was thwarted only when the FCC audited Respondents' licenses and determined that Respondents had failed to

construct a major percentage of the component stations within the applicable time period (App. at 145-147). As a result, prior to Petitioners' initiation of this suit, the FCC had already determined that certain of Respondents' licenses had automatically terminated by operation of law under 47 C.F.R. §§ 80.49, 1.946 and 1.955 and had identified these licenses as "cancelled" (App. at 109).

As part of a concerted effort to unfairly compete with Petitioners, Respondents also interfered with Petitioners' contractual relations, including contracts between Petitioner AMTS Consortium, LLC and (i) an individual named Thomas Kurian and (ii) a company known as Northeast Utility Service Company (App. at 114-115).[4]

These actions, among others, gave Respondents an unfair advantage over Petitioners in the wireless market and thwarted competition in this market. For example, because the ULS did not accurately reflect the cancellation of Respondents' licenses, Respondents created the false impression that they held valid site-based licenses that they did not in fact hold, thereby reducing the value of the geographic licenses upon which Petitioners intended to bid (App. at 126-127). This, in turn, restricted Petitioners' ability to raise funds to participate in

[4] Additionally, Respondents violated the laws of the states in which they operate by failing to register to do business (a threshold requirement for operating stations in those states) and by failing to collect and pay taxes and other fees required by those states (App. at 102).

license auctions (App. at 127). These actions formed the basis of Petitioners' lawsuit.

### B. Procedural History

#### 1. Trial Court Proceedings

On June 22, 2007, Petitioners filed a Complaint against Respondents, alleging California state law claims including fraud, negligent misrepresentation, interference with prospective economic advantage and unfair competition under California's antitrust statute, the Cartwright Act, Cal. Bus. & Prof. Code § 16720. On November 5, 2007, Petitioners voluntarily filed a First Amended Complaint ("FAC").

On December 21, 2007, Respondents filed demurrers to the FAC. On February 11, 2008, the lower court sustained the demurrers, concluding that adjudication of the FAC would have required the court to determine whether Respondents' licenses remained valid or were terminated, and thus necessarily would constitute prohibited state regulation of entry into the mobile service market. (App. at 84-90. Nonetheless, the lower court granted Petitioners leave to amend their Complaint to allege facts sufficient to show that, with regard to the licenses identified in the Complaint, the FCC "has finally determined that [Respondents] ... wrongfully retained cancelled licenses." (App. at 87).

Petitioners filed a Second Amended Complaint (the "SAC") on March 19, 2008 (App. at 97-161). The SAC distinguished factually between licenses subject

to final FCC revocation determinations ("Cancelled Licenses") and those that were still the subject of ongoing FCC proceedings ("Challenged Licenses – Ongoing") (App. at 109).[5] Petitioners' SAC did not add any new causes of action, but instead split the causes of action already existing in the FAC into two separate sets of claims, depending on the status of the underlying license at issue: (1) Causes of action related to the "Challenged Licenses – Ongoing"; and (2) Causes of action related to the "Cancelled Licenses" (App. at 130-154, 156-157).[6]

On April 16 and 18, 2008, Respondents filed Demurrers to the SAC arguing that the FCA preempts all of the claims in the SAC. In support of their preemption argument, Respondents relied upon 47 U.S.C. § 332(c)(3)(A), which states, in relevant part:

> [N]o State or local government shall have any authority to regulate the entry of or the rates

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[5] The term "Cancelled Licenses" as used in the SAC referred to those licenses formerly held by Respondents that had automatically terminated and that were subsequently identified by the FCC as cancelled (App. at 109). "Challenged Licenses -- Ongoing" referred to those licenses that had automatically terminated by operation of law (e.g., because Respondents had failed to develop them into stations), but that were the subject of ongoing administrative proceedings before the FCC (App. at 109).

[6] The SAC also alleged that Respondents violated the Cartwright Act by failing to meet filing, tax, and property-access requirements under the laws of the states in which they purported to operate AMTS stations.

> charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.

On May 12, 2008, the Superior Court sustained the demurrers, holding that all of the Petitioners' claims fell "within the express preemption clause of the Federal Communications Act (FCA)" (i.e., § 332(c)(3)(A)) (App. at 40-83). According to the Superior Court, adjudication of *any* of the claims pled in the SAC necessarily implicated the regulation of entry into the mobile service market (App. at 40-83).

### 2. Decision Of The Court Of Appeal

The Court of Appeal affirmed. According to the Court, the "dispositive" question was whether the "license warehousing scheme allegations upon which the causes of action are based intrude upon federal regulation of 'entry' to the market" (App. at 27). The Court held that the distinction Petitioners "attempt(ed) to draw between initial licensing and renewal, revocation, or termination of licenses is illogical and inconsistent with the purpose of section 332(c)(3)(A) to ensure uniformity in the law applicable to mobile service providers with respect to market entry" (App. at 28).

The Court of Appeal likewise rejected "plaintiffs' contention that the distinction ... between 'cancelled licenses' and 'challenged license,' avoids preemption" (App. at 29-30) and held that remaining allegations

were "premised upon, and simply another variation of the licensing warehousing scheme allegations" (App. at 34). In so holding, the Court of Appeal decided that the SAC was based on licensing violations, without addressing Petitioners' allegations of fraud and tortious interference. Accordingly, the Court of Appeal found that the Petitioners' claims are preempted by § 332.

On October 13, 2009, Petitioners filed a Petition for Rehearing with the Court of Appeal (App. at 217-233). The time in which the Court of Appeal could have granted this Petition expired on October 26, 2009. *See* Cal. R. Ct. 8.268(c). Accordingly, Petitioners filed a Petition for Review to the California Supreme Court on November 4, 2009, which was denied on January 13, 2010. (App. at 91).

## REASONS FOR GRANTING THE WRIT

### A. Introduction

One the major purposes of telecommunications laws is to promote competition.[7] As the telecommunications industry has expanded to wireless service, some industry participants have

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[7] *See* Conference Report, Telecommunications Act of 1996, H.R. 104-458, at p. 1 (1996) (purpose of bill was "to provide for a pro-competitive, deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced services and information technologies and services to all Americans by opening all telecommunications markets to competition....")
http://en.wikipedia.org/wiki/Telecommunications_Act_of_1996_-cite_note-1#cite_note-1

resorted to unfair business and anti-competitive practices, engendering allegations of misrepresentations and failures to disclose, and sparking lawsuits from consumers and competitors in federal and state courts. Courts have therefore had to address the preemptive scope of 47 U.S.C. § 332(c)(3)(A).

The FCC takes the position that § 332(c)(3)(A) generally does not preempt state law tort claims. For example, in *In Re Wireless Consumers Alliance, Inc.*, 15 FCC Rcd 17021, 17026-34 (2000), the FCC held that (i) although § 332 preempts actual rate-setting, it does not preempt state contract or consumer fraud laws relating to the disclosure of rates and rate practices; (ii) § 332 generally does not preempt the award of monetary damages based on state tort or contract claims; (iii) state courts are not, as a general matter, prevented by § 332 from awarding damages to customers based on violations of state contract or consumer fraud laws; and (iv) tort and contract law have the function of compensating victims, which distinguishes them from the direct forms of regulation entrusted to the FCC. Most fundamentally, the FCC held that "[i]f ... providers are to conduct business in a competitive marketplace, and not in a regulated environment, then state contract and tort law claims should generally be enforceable in state courts." *Id.* at 17034. *See also In Re: Southwestern Bell Mobile Systems, Inc.*, 14 FCC Rcd 19898 *26 (1999) ("We do not agree ... that state contract or consumer fraud laws relating to the disclosure of rates and rate

practices have generally been preempted.... Such preemption by Section 332(c)(3)(A) is not supported by its language or legislative history. [T]he legislative history of Section 332 clarifies that billing information, practices and disputes—all of which might be regulated by state contract or consumer fraud laws—fall within 'other terms and conditions' which states are allowed to regulate. Thus, state law claims stemming from state contract or consumer fraud laws governing disclosure of rates and rate practices are not generally preempted under Section 332.").

The FCC's position is entitled to significant deference. As a New Jersey appellate court has held, "a state court should not sacrifice the public policies of the State to some ephemeral view of the federal interest [under §332(c)(3)(A)] which is at variance with the considered opinions of the administrative agency charged with overseeing the subject matter field, as well as those of most of the courts which have addressed the issues." *Union Ink, Co., Inc. v. AT&T Corp,* 801 A.2d 361, 375 (N.J. Super. 2002).

Nonetheless, despite the FCC's views, the law on §332 preemption varies widely from jurisdiction to jurisdiction. As explained below, in the absence of a clear pronouncement from this Court, courts have adjudicated claims of § 332 preemption *ad hoc*, leading to a patchwork of inconsistent results, stemming from differing theories of preemption.

### B. Review Should Be Granted To Establish Uniformity.

#### 1. There Is A Split In Authority Regarding The Preemptive Scope Of § 332(c)(3)(A).

Preemption is primarily a question of statutory construction, and, thus we inquire into the objective or purpose of Congress in enacting the relevant statute. *See Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208 (1985); *Cipollone*, 505 U.S. at 516.

Preemptive intent may be expressly stated in the language of the statute or it "may be inferred if the scope of the statute indicates that Congress intended federal law to occupy the legislative field, or if there is an actual conflict between state and federal law." *Altria Group*, 129 S. Ct. at 543. However, even if "a federal law contains an express pre-emption clause, it does not immediately end the inquiry because the question of the substance and scope of Congress' displacement of state law still remains." *Id.*

Several doctrines place limits on preemption. First, there is an "assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Id.*, (*quoting Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

Second, because of this "presumption against preemption," *Cipollone*, 505 U.S. at 516, Congress' intent to preempt must be "clear and manifest" to preempt state law in a field traditionally occupied by

the states. *Wyeth v. Levine*, 129 S. Ct. 1187, 1195 (2009)(emphasis added); *see also Altria Group*, 129 S. Ct. at 543 ("[w]hen the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption'"), (*quoting Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005)).

Third, courts are required to assess complaints on a claim-by-claim basis to determine whether preemption applies. *See Beckett v. Mellon Investor Servs. LLC*, 329 Fed. Appx. 721, 723 (9th Cir. 2009); *Ball v. GTE Mobilnet of California*, 81 Cal. App. 4th 529 (2000).

Finally, violation of a federal statute may give rise to a state law cause of action without running afoul of preemption, where state law simply supplies a remedy not available under federal law. *See Riegel v. Medtronic, Inc.*, 552 U.S. 312, 330 (2008) ("Thus [the Medical Device Amendments Act] does not prevent a State from providing a damages remedy for claims premised on a violation of FDA regulations; the state duties in such a case 'parallel,' rather than add to, federal requirements.").

Section 332 of the FCA poses particular challenges with respect to the preemption doctrine "because it leaves its key terms undefined. It never states what constitutes rate and entry regulation or what comprises other terms and conditions of wireless service." *Cellular Telecom Indus. v. FCC*, 168 F.3d 1332, 1336 (D.C. Cir. 1999). As a result, courts are split regarding § 332(c)(3)(A)'s preemptive

scope. This split has manifested itself with respect to the question of which preemption rubric is applicable to state-law claims asserted against FCC licensees (*i.e.*, complete preemption, conflict preemption, or implied field preemption) and with respect to the types of substantive state-law claims that are preempted.

### a. Courts Are Split On Which Preemption Rubric Is Applicable

At one end of the scope of preemption continuum, the Seventh Circuit has held that § 332(c)(3)(A) has completely preemptive effect. *See Bastien v. AT&T Wireless Services*, 205 F.3d 983, 986-87 (7th Cir. 2000) (holding that "Congress intended *complete preemption*" by passing § 332(c)(3)(A)) (emphasis added). Under this line of authority, virtually any putative state law claim having any nexus to an FCC licensee's business activities is "federalized," and, therefore, federal courts have exclusive federal question jurisdiction over such claims. *Id.*[8] In other words, the Seventh Circuit holds not only that § 332(c)(3)(A) broadly preempts state law claims, but

[8] *See also, Chandler v. AT&T Wireless Services*, 2004 U.S. Dist. LEXIS 14884 (S.D. Ill. July 21, 2004) (Customer claim arising out of early cancellation fee deemed preempted under complete preemption principles), *Redfern v. AT&T Wireless Services*, 2003 U.S. Dist. LEXIS 25745 (S.D. Ill. June 16, 2003) (complete preemption bars customer claim based on early termination fee), *Phillips v. AT&T Wireless*, 2004 U.S. Dist. LEXIS 14544 [4]14-15 (S.D. Iowa July 29, 2004).

also that federal courts are the only tribunals empowered with the authority to assess the preemption issue.

Other courts have rejected a complete preemption approach while nevertheless finding particular state-law claims preempted under either "implied" or "conflict" preemption principles. *See e.g.*, *Cello Partnership v. Hatch*, 431 F.3d 1077 (8th Cir. 2005) (Minnesota statute prohibiting an increase in rates without first disclosing changes in contractual terms to customers expressly preempted under § 332); *Murray v. Motorola, Inc.*, 982 A.2d 764 (D.C. 2009) (customers' suit against service providers alleging injury through cell phone use was preempted under the doctrine of implied preemption to the extent these customers sought to hold the defendants liable for injuries caused by cell phones that met FCC radio frequency radiation standards); *Farina v. Nokia*, 578 F.Supp.2d. 740 (E.D. Pa. 2008) (cell phone users' claims against providers alleging that the providers suppressed knowledge about adverse health risks of cell phone usage impliedly preempted).

In contrast, the Second, Eleventh, Fourth, and Sixth Circuits have expressly rejected the position that § 332(c)(3)(A) embodies "complete preemption." *See, e.g.*, *Pinney v. Nokia*, 402 F.3d 430, 450 (4th Cir. 2005) ("there is simply no evidence that Congress intended ... to preempt completely state law claims that are based on a wireless service provider's sale and promotion of wireless telephones."); *GTE*

*Mobilnet Ohio v. Johnson*, 111 F.3d 469, 479 (6th Cir. 1997) (The language of § 332(c)(3)(A) "does not compel the conclusion that ... the states may no longer adjudicate individual cases involving specific allegations of anti-competitive or discriminatory conduct."); *Smith v., GTE*, 236 F.3d 1292 (11th Cir. 2001) (customer claims stemming from allegedly exorbitant telephone leasing charges not completely preempted); *Marcus v. AT&T Corp.*, 138 F.3d 46, 53-55 (2d Cir. 1998) (claims alleging fraudulent billing practices not completely preempted).[9]

The state appellate courts of last resort in Ohio and Washington and the District of Columbia Court of Appeals have similarly rejected a "complete preemption" framework. *See, e.g., Tenore v. AT&T Wireless Services*, 962 P.2d 104 (Wash. 1998) (cellular customers' claim that providers committed fraud by not disclosing a billing practice of rounding up calls to the next minute not completely preempted under § 332(c)(3)(A)); *New-Par v. PUC of*

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[9] *See also Lewis v. Nextel Communications, Inc.*, 281 F.Supp.2d. 1302 (N.D. Ala. 2003) (Customer claims against provider not completely preempted); *Whitney v. Alltel Communications, Inc.*, 2003 U.S. Dist. LEXIS 26066 *12-13 (W.D. Mo. Oct. 16, 2003) (Customer claims against provider for assessing a surcharge for a regulatory cost recovery fee not completely preempted); *Brown v. Washington/Baltimore Cellular, Inc.*, 109 F.Supp.2d. 421, 423 (D. Md. 2000) (subscriber suit to recover unlawful late fees is not completely preempted, since "late fees are not included in 'rates' of service, but rather are part of the 'other terms and conditions' of service ... Congress did not preempt all claims that would influence rates, but only those that involve the reasonableness or lawfulness of the rates themselves.").

*Ohio*, 98 Ohio St. 3d. 277 (2002) (price discrimination claim by a reseller against a wholesale cellular service provider not completely preempted); *Murray, supra* (suit by cellular customers against service providers, alleging injury through cell phone use, not completely preempted). These cases hold that § 332 preempts only those claims that "second guess" an FCC decision regarding "state regulation of rates or market entry into telecommunications." *TPS Utilicom Servs., Inc. v. AT&T Corp.*, 223 F.Supp.2d 1089, 1108 (C.D. Cal. 2002).

**b. Courts Are Split Regarding Which Types Of State-Law Claims Are Preempted Under § 332(c)(3)(A).**

Given these conflicting preemption theories, it is not surprising that courts assessing the same or similar claims have reached divergent conclusions as to whether such claims are preempted by § 332(c)(3)(A).

This split in authority is particularly pronounced with respect to state-law misrepresentation claims such as those asserted by Petitioners here. Some appellate courts have held that such claims are preempted. In *Bastien,* for example, a wireless consumer alleged that AT&T had committed consumer fraud by misleading the plaintiff about the nature of service. The Seventh Circuit held that the

claims were preempted by § 332. *Bastien,* 205 F.3d at 989-90.[10]

Likewise, in *Cello Partnership,* the Eighth Circuit adopted a preemption framework limiting a state's ability to regulate deceptive conduct by an FCC licensee. At issue in *Cello Partnership* was a Minnesota statute stating that wireless carriers had to "notify the customer in writing of any proposed substantive change in the contract between the provider and the customer 60 days before the change is proposed to take effect." 431 F.3d at 1081-82. The Eighth Circuit found that this statute "constitutes impermissible rate regulation preempted by federal law," and that it was preempted by § 332(c)(3)(A). *Id.*, at 1082.

In *Pinney,* however, the Fourth Circuit reached a conclusion diametrically opposed to *Bastien* and *Cello Partnership.* The *Pinney* plaintiffs' claims were likewise based on misrepresentations and failures to disclose (regarding the level of radio frequency radiation emitted by cell phones without the use of headsets). The Court squarely rejected the defendants' express preemption claim and the *Bastien* approach:

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[10] Several District Courts have followed the *Bastien* rationale. *In re. Comcast Cellular Telecoms Lit.*, 949 F. Supp. 1193 (E.D. Pa. 1996) (claims for consumer fraud, arising from the defendant's practice of charging for non-communication time and rounding up minutes for billing purposes, preempted by §332(c)(3)(A)).

> Nokia argues that ... plaintiffs seek to use state law to regulate technical specifications for wireless telephones; this, Nokia says, would hinder entry into the commercial mobile service market because the FCC requires that wireless service providers certify that they are using only FCC-authorized equipment ... While § 332(c)(3)(A) is unclear as to what precisely constitutes a barrier to entry into the PCS market, we conclude that the relief sought by the Naquin plaintiffs (a headset requirement) is not such a barrier ... A headset requirement for wireless telephones would not constitute a barrier to entry into the PCS market because wireless telephones are only used to access a wireless service provider's network of coverage; the telephones themselves do not provide the actual coverage ... Because the relief sought by the Naquin plaintiffs would not be a barrier for wireless service providers seeking to enter the PCS market, § 332(c)(3)(A) does not expressly preempt the claims of the Naquin plaintiffs.

*Id.* at 455-56.

The Fourth Circuit likewise rejected the argument that the plaintiffs' claims were barred by conflict or field preemption:

> [T]he FCA provides no evidence of such an objective. Congress enacted § 332 to ensure the availability of a nationwide network of wireless service coverage, more specifically, to develop

> the infrastructure necessary to provide wireless services ... [I]n pursuing its objective of ensuring the availability of a nationwide network of wireless service coverage, Congress has been very careful to preempt expressly only certain areas of state law, preserving the remainder for state regulation.

*Id.* at 457-58.[11]

At least two appellate courts of last resort have likewise expressly determined that the scope of § 332 preemption does not extend to state-law misrepresentation claims. In *Tenore*, the Washington Supreme Court held that a claim by cellular customers that wireless providers had committed fraud by not disclosing a billing practice of rounding up calls to the next minute was not

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[11] Furthermore, a number of district courts have held, in the course of rejecting claims of complete preemption, that adjudicating an allegation of fraud is not tantamount to state regulation over rates or market entry. *See Sanderson, Thompson, Ratledge & Zimny v. AWACS, Inc.*, 958 F. Supp. 947, 956 (D. Del. 1997) (claims alleging failure to disclose improper billing practice of rounding up all calls to the highest minute "do not challenge the reasonableness of a billing practice"); *DeCastro v. AWACS, Inc.*, 935 F. Supp. 541, 550 (D.N.J. 1996) (claims alleging a provider's fraudulent failure to disclose a practice of billing customers when a call is initiated, rather than when a connection is made, "do not challenge the billing practice as unreasonable or contrary to law, nor does their resolution require a court to assess the reasonableness of the defendant's billing practice").

preempted under § 332(c)(3)(A) of the FCA. 962 P.2d at 345. Most recently, in *Murray*, the District of Columbia Court of Appeals found that the plaintiffs' claims against phone manufacturers and retailers under the D.C. Consumer Protection Act (for failing to disclose health risks associated with cell phone use) were not preempted under express, conflict, or implied preemption. *Murray*, 982 A.2d at 782-84, 789.

Similar conclusions have also been reached by intermediate state appellate courts. *See Union Ink Co., Inc.*, 801 A.2d at 369-78 ("We are called upon to determine ... the extent to which the statutory language expressly pre-empts a state court from awarding damages against providers of cellular telephone service based upon state statutes dealing with consumer fraud or under the state's common law regarding fraud or negligent misrepresentation ... [the trial court] erred in holding that plaintiffs' state law ... fraud ... claims are pre-empted by federal law ... the motion judge seemed unaffected by this State's public policies affording broad protection to consumers against deceptive commercial practices ... we conclude that plaintiffs' State law claims ... are not barred by federal law.") *See also Bryceland v. AT&T*, 114 S.W.3d 552 (Tex. App. 2002).

The analytical inconsistency embodied by these divergent authorities has also manifested itself in a conflict among the California state appellate courts created by the decision below. For example, in *Spielholz v. Superior Court*, 86 Cal. App. 4th 1366

(2001), the Court of Appeal held that customer claims for monetary relief based upon a provider's failure to disclose "dead zones" were not preempted. The Court concluded that:

> [Section 332] does not disclose a congressional intent to preempt state court monetary awards that may require a determination of the value of services provided but do not *directly* regulate rates. We presume that if Congress had intended to preempt such state law remedies, it would have expressly so stated ... a claim that does not ***directly*** challenge the rate but directly challenges some other activity, such a false advertising, and ... seeks damages arising from the activity is not an attempt to regulate rates and is not expressly preempted under Section 332(c)(3)(A).

*Id.* at 1374-75 (emphasis added).

*Spielholz* further held that "A judicial act constitutes rate regulation only if its *principal purpose and direct effect* are to control rates." *Id.* at 1374 (emphasis added).

Likewise, in *Ball,* wireless consumers sued providers of wireless services, alleging that the providers' billing practice of charging for non-communication time (non-talking time, including "rounding-up" to the next full minute), violated California's consumer protection statute, Cal. Bus. & Prof. Code § 17200, *et seq.* The Court of Appeal reversed in part. Although the Court held that the

plaintiffs' claims were preempted to the extent they sought to challenge the practice of charging for non-communication time, it further held that these claims were not preempted to the extent they were premised on the providers' *failure to disclose* this billing practice. *Ball*, 81 Cal. App. 4th at 543; *see also Pacific Bell Wireless, LLC v. PUC*, 140 Cal. App. 4th 718, 734 (2006) (holding that a public utility commission's fine against a wireless phone company was not preempted by § 332, noting that "[t]he principal purpose and direct effect of the penalties imposed by the Commission are to prevent misrepresentations by Cingular and to compensate ... wireless customers ... The effect of these penalties on Cingular's rates is incidental, and the Commission's decisions are therefore not preempted.")

By contrast, the Court of Appeal below took a very different approach. It determined that all of the Petitioners' claims are barred by § 332 simply because they related obliquely to licensing and involved torts committed during the time in which Respondents held FCC licenses. This approach overlooked that Petitioners' specific allegations and causes of action did not *directly* relate to (or seek to affect) FCC rates or market entry. By using this approach, the Court of Appeal stretched the definition of § 332 "market entry" beyond its common sense meaning.

### 2. The Cases Taking A Narrow View Of § 332(c)(3)(A) Preemption Are Better-Reasoned.

The cases taking a narrow view of § 332(c)(3)(A) preemption - rejecting complete preemption and holding that only claims that *directly* challenge rates or market entry are barred under ordinary preemption principles - represent the better-reasoned line of authority.

First, under the plain language of § 332, state governments are only denied "authority to *regulate* the entry of or the rates charged by any commercial mobile service or any private mobile service." By using the term "regulate," Congress preempted only the positive statutory and regulatory enactments of those governments, and not state-law claims for damages. This Court has made clear that where a federal statute prohibits state "regulation," it "most naturally refers to positive enactments by those [legislative or regulatory] bodies, not to common-law damages actions." *Cipollone*, 505 U.S. at 519. This Court made the same point in *Sprietsma v. Mercury Marine*, 537 U.S. 51, 62-63 (2002), where it held that the express preemption clause of the Federal Boat Safety Act pre-empted only positive enactments. If "law," the Court noted "were read broadly so as to include the common law, it might also be interpreted to include regulations, which would render the express reference to 'regulation' in the pre-emption clause superfluous." *Id.* at 63. The Court further explained that limiting the preemption clause to

positive law "does not produce anomalous results. It would have been perfectly rational for Congress not to pre-empt common-law claims, which-unlike most administrative and legislative regulations-*necessarily perform an important remedial role in compensating ... victims.*" *Id.* at 64. (emphasis added).

Under this definition of "regulation," Petitioners' California state-law claims for damages clearly were not preempted, since they did not involve a positive statutory or regulatory enactment by the State of California. Moreover, the specific nature of Petitioners' claims for tortious interference with contract, fraud and unfair competition renders them even one step further removed from "regulation," because these claims would have been fully viable as a matter of state law even if the respondents held no FCC issued license whatsoever. Simply put, a myriad of circumstances exist where these types of claims can be brought in the absence of *any* licensing scheme.

In this respect, § 332 stands in marked contrast to other preemption clauses contained in federal statutes. For example, the express preemption clause in the Airline Deregulation Act, 49 U.S.C. § 41713(b)(1), contains statutory language of "unusual breadth" because it prohibits states from enacting or enforcing any law "*relating to* rates, routes or services of any air carrier." *Altria Group*, 129 S. Ct. at 548 (emphasis added). Unlike the

Airline Deregulation Act, § 332 does not use the broad language of preemption of "any law relating to" commercial or private mobile carriers. Instead, this section preempts only those claims that "regulate the entry of or the rates charged by" any commercial or private mobile service. Indeed, as if to underscore this narrow approach, states are expressly authorized to regulate "*the other terms and conditions* of commercial mobile services." *See also Tenore* (citing to the § 332 terms and conditions clause as grounds for rejecting preemption); *Murray*, 982 A.2d at 774 (same, noting that the trial court's "conclusion cannot be reconciled with the second clause of section 332 (c)(3)(A), which expressly permits states to restrict 'the other terms and conditions of commercial mobile services' without regard to whether such terms and conditions may create hurdles or burdens attendant to participating in the market.").

Moreover, this approach best effectuates the well-settled "assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Altria Group*, 129 S. Ct. at 543; *see also Pinney*, 402 F.3d at n.4 (presumption against preemption applicable to telecommunications-related claims because "[s]tates continue to have considerable authority in the wireless telecommunications area," and because "[t]he presumption against preemption is even stronger against preemption of state remedies, like tort recoveries, when no federal remedy exists.").

When construing § 332, it is also important to define exactly what is meant by the term "entry." In *Fedor v. Cingular Wireless,* 355 F.3d 1069 (7th Cir. 2004), the plaintiff alleged that delayed charges by Cingular appeared on his bills during improper months, making his monthly charges inaccurate. *Id.* at 1070-1071. Cingular argued that the plaintiffs' complaint was barred by Section 332's preclusion of claims concerning market entry because, if successful, the plaintiff's claims would "necessarily require" Cingular to alter its infrastructure by building cellular towers in areas that it did not already have them. *Id.* at 1074. According to Cingular, this kind of fundamental change in Cingular's infrastructure would have affected Cingular's actual, physical entry into the telecommunications market. *Id.* The Seventh Circuit disagreed, however, holding that this stretched the allegations in the complaint "beyond recognition." *Id.* According to the Court, this was "an accounting problem, not an infrastructure problem," and, if the plaintiff succeeded, Cingular would be required only to adjust its accounting practices. *Id.* Put differently, the Seventh Circuit determined that the plaintiff's claim did "not relate to the construction or placement of towers at all." *Id.*

Analogously, Petitioners are not seeking to regulate market entry in this case. They have not, at any point in this case, attempted to challenge the criteria under which FCC licenses were issued to Respondents in the first instance, nor have they

second-guessed the FCC's initial grant of such licenses to Respondents. Furthermore, none of Petitioners' claims sought to regulate the competitive auction bidding process. Likewise, none of these claims sought to challenge eligibility requirements for obtaining FCC licenses or frequencies. That is, Petitioners did not contend that Respondents were ineligible to obtain FCC licenses or that Respondents somehow did not qualify to obtain frequencies or licenses in the first place. Petitioners simply sought redress for damages they sustained due to Respondents' common-law torts. These torts happened to be associated with Petitioners' use of FCC-issued licenses (many of which had already been deemed cancelled by the FCC at the time Petitioners' suit was initiated), but this use was not the *sine qua non* of Petitioners' claims.

Finally, the approach proposed by Petitioners best effectuates the intent of the § 414 savings clause, which states that "[n]othing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." Courts have recognized the important interplay between § 414 and § 332, and have held that it "preserves causes of action for breaches of duties distinguishable from those created under the [FCA]." *Cooperative Commc'ns, Inc. v. AT&T Corp.*, 867 F. Supp. 1511, 1516 (D. Utah

1994).[12] In *Pinney*, the Fourth Circuit held that the "savings clauses counsel against any broad construction of the goals of § 332 and § 332(c)(7) that would create an implicit conflict with state tort law." *Pinney*, 402 F.3d at 450. And in *Tenore*, the Washington Supreme Court held that the existence of the § 414 savings clause precluded a finding that preemption barred claims by customers against

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[12] The nature of the duty at issue is the focus of preemption inquiries generally, not just those arising under the FCA. For example, in *Altria Group*, this Court, in order to "determine whether a particular common-law claim" was "pre-empted, ... inquired" in part "whether the legal duty that is the predicate of the common-law damages action constitutes" the same kind of legal duty as that encompassed by the act at issue. *Altria Group*, 129 S. Ct. at 545. This Court held that the Appellees' claims, which concerned unfair trade practices and fraud, were not preempted by the Federal Cigarette Labeling and Advertising Act, in part because the claim at issue, fraud, alleged a breach of the duty not to deceive, not one based on "smoking and health." *Altria Group*, 129 S. Ct. at 545, 546 and 546 n.9. *See also Cipollone*, *supra* at 518-530; *Bates*, *supra*, at 443-454.

providers alleging that providers committed fraud by not disclosing a practice of "rounding up").[13]

For each of these reasons, the conflict of authority with respect to the scope of FCA preemption should be resolved in favor of a narrow view of preemption.

### C. The Court Should Grant Review To Settle An Important Question Of Law.

The question whether § 332(c)(3)(A) preempts all claims in any way associated with an FCC-issued license is an important one, because it potentially affects many FCC licensees and because it has been and will continue to be extensively litigated. If, as the Court of Appeal suggested, § 332 preempts all such claims, any holder of an FCC license would be able to engage in unlawful and anti-competitive

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[13] *See also Cooperative Commc'ns*, 867 F. Supp. at 1516 ("AT&T's contention that these claims are preempted ignores the purpose underlying Section 414. ... [I]nclusion of the savings clause clearly indicates Congress' intent that independent state law causes of action, such as interference with contract or unfair competition, not be subsumed by the Act, but remain as separate causes of action."); *Iberia Credit Bureau, Inc. v. Cingular Wireless*, 668 F.Supp.2d. 831, 839-840 (W.D. La. 2009) (*quoting Geier v. Honda Mtr. co., Inc.*, 529 U.S. 861, 868 (2000)(breach of contract claims brought by consumers against a wireless company alleging a failure to disclose billing practices are not preempted, in light of, *inter alia*, the § 414 savings clause, because "Congress could have easily chosen to preempt all state law claims," but chose not to, and because the savings clause "assumes that there are ... cases to save."); *Lewis v. Nextel Communications, Inc.*, 281 F.Supp.2d. 1302 (N.D. Ala. 2003)(customer claims against provider not completely preempted in light of § 414 savings clause).

practices against competitors with impunity. This result would frustrate the states' established right to regulate business activities within their jurisdictions. An FCC-issued license should not be a *carte blanche* to commit state law torts.

### 1. Review Is Necessary To Preserve The States' Ability To Thwart Anticompetitive Business Practices

The Court of Appeal's opinion undermines antitrust policies designed to protect competitors from unfair business practices, such as those committed by Respondents in this case. As a matter of policy, Congress has expressly provided that antitrust laws "coexist" with FCC regulation of rates and market entry and that the Sherman Act and FCA were intended to be used in tandem to accomplish the goal of stimulating competition. *Covad Communications Co. v. Bell South Corp.*, 299 F.3d 1272-1280, 1282 (11th Cir. 2002) *vacated*, 540 U.S. 1147 (2004)(in light of *Verizon Communications v. Trinko*, 540 U.S. 398 (2004).[14] Indeed, this Court has cited to the antitrust savings provision of the FCA, which states that "nothing [in the FCA] shall be construed to modify, impair, or supersede the

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[14] *See also United States v. AT&T*, 498 F. Supp. 353, 364 (D.D.C. 1980) ("Although technically the [FCA] focuses on public necessity and convenience and the Sherman Act on competition, in a very real sense both the FCC, in its enforcement of the [FCA], and the courts, in their application of the antitrust laws, guard against unfair competition and attempt to protect the public interest.")

applicability of *any* of the antitrust laws." *Verizon Communications, Inc. v. Trinko,* 540 U.S. 398, 406 (2004) *citing* 110 Stat. 56, 143 (1996)(emphasis added) codified at 47 U.S.C. § 152 note (1996). The rationale underlying this principle is that "the legislative history surrounding the 1996 Act, reflect[s] that the President, the Congress, the Department of Justice and the FCC have emphasized the critical need for the antitrust laws to work in conjunction with the 1996 Act in order to spur competition in the telecommunications industry." *Covad,* 299 F. 3d at 1281.

In this respect, the FCA is consistent with this Court's long-standing admonition against implied statutory limitations that might result in antitrust immunity. *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 597 (1976); *U.S. v. Philadelphia National Bank*, 374 U.S. 321, 350-51 (1963) ("Repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions.").

This Court has yet to decide whether the antitrust savings provision contained in Section 152 of the FCA applies with equal force to *state* antitrust statutes designed to curb anti-competitive activity such as California's Cartwright Act. The Court of Appeal erroneously "set aside" the question whether the statute's reference to "antitrust laws" includes state antitrust laws (App. at 38). That question cannot properly be avoided because if, as Petitioners

contend, "antitrust laws" include state antitrust laws, the savings clause *mandates* the preservation of Petitioners' Cartwright Act claims. This is an important issue that this Court should resolve.

Although § 152 does not define "antitrust laws," the rationale underlying the preservation of federal antitrust laws applies with equal force to state antitrust laws. Such an interpretation of §152 would be consistent with the settled principle that the federal and state antitrust frameworks are designed to co-exist. *See California v. ARC America Corp.*, 490 U.S. 93, 101 (1989) ("Congress has not pre-empted the field of antitrust law. Congress intended the federal antitrust laws to supplement, not displace, state antitrust remedies.")(citations omitted). *See also* 21 Cong. Rec. 2457 (1890) (remarks of Sen. Sherman); *Cantor* at 632-35 (Stewart, J. dissenting).

The "Cartwright Act declares as its ultimate purpose 'to promote free competition in commerce and all classes of business." *State of California ex rel. Van De Kamp v. Texaco, Inc.*, 46 Cal.3d 1147, 1184 (1988) (citing Cal. Stats. 1907, ch. 530, tit., p. 984), (emphasis omitted) *superseded by statute on other grounds,* Cal. Bus. Prof. Code, § 17200. In this respect, the Cartwright Act mirrors federal antitrust laws, the purpose of which "is to protect competition." *Gordon v. New York Stock Exchange, Inc.* 422 U.S. 659, 689 (1975); *Covad, supra*. Stated another way, the Cartwright Act (and antitrust laws generally) complement FCC licensing laws. *Covad,*

299 F. 3d at 1281 (antitrust laws work "in conjunction with the 1996 Act" to "spur competition"). As such, the FCA should not be construed in a manner that abrogates the Cartwright Act.

### 2. Review Is Necessary To Uphold Fundamental Principles Of Federalism

Review is also necessary to uphold fundamental principles of federalism. As noted above, Congress' intent to preempt must be clear and manifest to preempt state law in a field traditionally occupied by the states. *Wyeth,* 129 S. Ct. at 1195 & n.3 (2009). Thus, in *Altria Group,* this Court held that when the text of an express preemption clause is susceptible of more than one plausible reading, courts should ordinarily accept the reading that disfavors preemption. In other words, where "federal law is said to bar state action in [fields] of traditional state regulation," courts work "on the assumption that the historic police powers of the State [were] not to be superseded by the Federal Act unless that [was] the clear and manifest purpose of Congress." 129 S. Ct. at 543; *see also Wyeth,* 129 S. Ct. at 1195 and n.3.

Congress, in the FCA, far from manifesting an intent to preempt traditional state-law claims, evinced its intent to preserve such claims. *See, e.g.*, *Marcus*, 138 F.3d at 54 ("The FCA not only does not manifest a clear Congressional intent to preempt state law actions prohibiting deceptive business practices, false advertisement, or common law fraud,

it evidences Congress's intent to allow such claims to proceed under state law.")

Indeed, the § 414 savings clause itself expressly recognizes the importance of preserving state-law claims. *Marcus*, 138 F.3d at 54; *see also Pinney, supra*, and *Tenore*, *supra*. Moreover, this policy applies with particular force to Petitioners' claims. States have traditionally regulated in the area of business torts, and neither § 332, nor any other provision of the FCA, expresses a clear intent to abrogate this area of law. As the court in *Pinney* recognized, "[s]tates continue to have considerable authority in the wireless telecommunications area." *Pinney*, 402 F.3d at 454 n.4. Continued state regulation in this area is essential because the FCA does not provide any redress equivalent to state-law claims of deceit. *Marcus*, 138 F.3d at 54.

The Court of Appeal was unfaithful to principles of federalism embodied in the presumption against preemption. Its decision failed to recognize that "preemption diminishes the state sphere that federalism teaches us to protect." Kenneth Starr, American Bar Association, The Law of Preemption, A Report of the Appellate Judges Conference 47 (1991).

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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## APPENDICES

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Filed 9/25/09

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION ONE

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| WARREN HAVENS et al., *Plaintiffs and Appellants,* v. MOBEX NETWORK SERVICES, LLC et al., *Defendants and Respondents* | A122489 (San Mateo County Super. Ct. No. CIV-463985) |

Warren Havens, Telesaurus VPC, LLC, AMTS Consortium, LLC, Intelligent Transportation & Monitoring Wireless, LLC, and Telesaurus Holdings GB, LLC, (collectively plaintiffs) appeal from a judgment dismissing their second amended complaint against Mobex Network Services, LLC (Mobex), Maritime Communications Land Mobile, LLC (Maritime)

and Paging Systems, Inc. (PSI) (collectively defendants).

The complaint alleged causes of action for violations of the Cartwright Act (Bus. & Prof. Code, § 16720, et seq.) and Business and Professions Code section 17200, and common law causes of action for fraud, negligent misrepresentation, conversion and interference with prospective economic advantage, and interference with contract. All causes of action were based upon allegations that defendants had hoarded or warehoused licenses, falsely represented to the Federal Communications Commission (FCC) that they had constructed stations and provided required coverage, or failed to notify the FCC that they had not, and retained or renewed licenses that should have been automatically terminated under FCC rules.

After allowing plaintiffs an opportunity to amend, the court ultimately sustained defendants' demurrers to all causes of action alleged in the second amended complaint, without leave to amend, on the ground that they are preempted by the Federal Communications Act (FCA), specifically title 47 United States Code section 332(c)(3)(A).[1] Plaintiffs appeal from the judgment dismissing their second amended complaint.

We hold that the causes of action alleged in the second amended complaint are preempted by section 332(c)(3)(A) and affirm the judgment.

## I. FACTS

Since we are reviewing an order sustaining a

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[1] All further section references are to title 47 of the United States Code unless otherwise indicated.

demurrer to the second amended complaint, this summary of facts is based on facts alleged in the second amended complaint and documents judicially noticed by the trial court.

**The Parties**

Plaintiffs are individuals and limited liability companies engaged in the business of obtaining licenses issued by the FCC in the Automated Marine Telecommunications Service (AMTS) frequency spectrum, and Location and Monitoring Service (LMS) spectrum. They also develop businesses to provide new wireless communication services authorized by these licenses. Plaintiffs have cooperated to obtain and use their licenses principally for providing new, advanced wireless services essential for Intelligent Transportation Systems (ITS) as defined by the United States Department of Transportation, the FCC, and other federal and state agencies.

Defendants are also limited liability companies, and a corporation. Defendants are plaintiffs' competitors in the business of acquiring AMTS licenses and operating wireless stations and systems.

**Background Allegations Regarding Site-Based and Geographic Licenses**

"[Y]ears ago" the FCC granted defendants site-based AMTS licenses for a large portion of the United States. Defendants eventually acquired site-based licenses "in a large percentage of the major urban markets and high-use waterways throughout the United States, including virtually the entire length of the west coast of the States of California, Oregon and Washington."

The FCC issued site-based licenses "on a first-

come first-serve basis at no cost for the spectrum." A site-based license "authorize[s] construction and operation of systems only at" a specific location. FCC rules require the holder of a site-based license to construct a station, meaning that a "system is installed and its operations commenced with certain FCC-approved equipment and certain minimum performance" (construction and coverage requirements) within two years of the grant of the license (the construction period). The FCC may grant an extension of the construction period upon a showing of good cause.

Plaintiffs alleged that, under FCC regulations, if a licensee fails to meet the construction and coverage requirements within, the construction period the license terminates automatically. The license holder is also required to notify the FCC of the termination so the FCC can delete or cancel the license from its public license database known as the Universal Licensing Service or ULS. The LTLS is the official primary source relied upon by parties "considering bidding for [g]eographic [l]icenses in upcoming spectrum auctions."

Plaintiffs alleged that if a site-based licensed station "is terminated for any reason, then the AMTS spectrum and service territory" automatically reverts to the geographic license covering that region. The reason for the rules is to prevent license holders from "hoarding" or "[w]arehousing" spectrum that they do not actually develop and use, and preventing competitors from acquiring licenses to the spectrum.

In two FCC auctions in 2004 and 2005, plaintiffs were the high bidders for certain AMTS geographic

licenses that in the aggregate covered all of the United States except for an area around the Great Lakes. Geographic licenses are issued in public auctions and authorize the licensee to construct and operate stations within a defined area.

**Defendants' Alleged Wrongful Acts**

The FCC conducted an audit of defendants' licenses in 2004. As a result of this audit, the FCC identified some licenses held by defendants that it deemed cancelled because of defendants' failure to comply with FCC construction and coverage requirements. Plaintiffs designated these licenses as "cancelled licenses." They attached a list of the cancelled licenses as Exhibit A to the complaint.

Plaintiffs alleged that, in addition to the cancelled licenses, defendants continued to hold many other licenses that are subject "to ongoing administrative proceedings before the FCC." Plaintiffs alleged these licenses should be revoked or automatically terminated for the same reasons as the cancelled licenses. They designated these licenses as "challenged licenses." They attached a much longer list of the challenged licenses as Exhibit B to the complaint.

Plaintiffs alleged that defendants obtained all of their site-based licenses "pursuant to a scheme of bandwidth hoarding and 'Warehousing' whereby [d]efendants' purpose was not to construct and operate systems to service the public, but to lock-up AMTS spectrum in major markets, and thereby lockout competition . . . by making the large surrounding geographical licenses for the same frequencies . . . less economically viable to competitors, thus discouraging competition in the

auction," and enabling defendants to obtain AMTS geographic licenses at a substantial discount.

As part of this scheme, defendants allegedly failed to construct "a major percentage" of stations within the construction period set by the FCC, and "deliberately hid [such] failures from the FCC" by falsely claiming that the required construction would be or had been completed in false station activation notices to the FCC. Defendants also allegedly falsely represented in license application filings, and in statements to their competitors and the general public that they "satisfied the *sine qua non* technical 'coverage' requirement of site-based AMTS licenses" by the license deadlines. Plaintiffs further alleged that defendants had submitted applications to the FCC for renewal of licenses that actually should have been deemed automatically terminated for failure to comply with FCC rules for construction and coverage.

Plaintiffs alleged the foregoing conduct prevented plaintiffs and other competitors from obtaining licenses they otherwise could have obtained in auctions of geographic licenses. Specifically they alleged the FCC database upon which bidders rely did not reflect that certain of defendants' licenses were cancelled or automatically terminated. The inaccuracy of the database restricted plaintiffs' ability to raise funds to participate in auctions because defendants made it appear they held valid site-based licenses that reduced the value of the geographic licenses upon which plaintiffs intended to bid. According to plaintiffs, defendants' misconduct "directly resulted in [p]laintiffs' loss of winning bids in these auctions."

Plaintiffs also generally alleged that in certain states where defendants "purport[] to own and operate AMTS CMRS [commercial mobile radio service] Stations" defendants failed to register as entities doing business within the states, and failed to collect surcharges and other taxes from alleged customers and failed to obtain and maintain "required legal access" to physical antenna structures and other infrastructure necessary for "actual construction . . . of its alleged still-valid AMTS stations."

Plaintiffs further alleged defendant Maritime obtained a bidding credit to which Maritime was not entitled in competition against plaintiffs in one of the auctions before the FCC. The FCC had already ruled Maritime was not entitled to the credit. Defendants also allegedly made false statements about title to certain licenses in an attempt to interfere with a contract between Kurian and plaintiff ACL. Plaintiffs further alleged that, principally through PSI and Maritime, defendants made false claims to plaintiffs' client Northeast Utility Service Company (NUSCO) and other entities that licenses ACL had agreed to assign to NUSCO under a contract were encumbered by PSI's AMTS licensed spectrum.[2]

Plaintiffs alleged "[s]pectrum hoarding and Warehousing is against the public-interest purpose of wireless licensing and license applications in the FCA, FCC Rules and also breaches the State of California and [f]ederal laws protecting against anti-competitive conspiracies and actions." The

[2] We shall sometimes refer to all of the foregoing allegations collectively as "the license warehousing scheme."

primary damaging effect of defendants' license warehousing scheme was that it "blocked [p]laintiffs and other competitors . . . from obtaining . . . AMTS licenses they otherwise would have obtained, and suppresses competition."

**Summary of Causes of Action**

Based upon the foregoing general factual allegations the second amended complaint alleged statutory violations of the Cartwright Act and Business and Professions Code section 17200, and common law tort causes of action for fraud, negligent misrepresentation, conversion and interference with prospective economic advantage, and interference with contract.[3]

The license warehousing allegations we have summarized above underlay each cause of action. For example, with respect to their cause of action for a violation of the Cartwright Act (Bus. & Prof. Code, § 16720 et seq.), plaintiffs alleged defendants "combined and conspired" with each other for the purpose of restraining trade or preventing competition or maintaining monopolies in the relevant markets in violation of California Business and Professions Code section 16720 et seq. by: (1) hoarding or warehousing licenses; (2) making numerous false representations to the FCC and "the industry" that stations had been or would be timely constructed, and that defendants complied with requirements to provide overlapping or

[3] The second amended complaint actually alleged two causes of action each for interference with prospective economic advantage, fraud, unfair competition, and conversion. The primary difference between these duplicate causes of action was that one applied to the cancelled licenses, and the other to the challenged licenses.

continuous coverage, provided required service to maritime users, and used system equipment that complied with all FCC requirements for AMTS; (3) failing, "for years after licensed [s]tations had automatically terminated" to report their failure to construct to the FCC; (4) renewing licenses that plaintiffs claim should have been deemed terminated; (5) operating stations without an FCC license because the license had, according to plaintiffs, automatically terminated; and (6) failing to pay fees taxes and other costs imposed by state law where defendants purport to own and operate CMRS licenses thereby gaining a competitive advantage by lowering their cost of doing business.

Similarly, the cause of action for interference with prospective advantage alleged plaintiffs "had an economically beneficial relationship with the FCC as the subject licensing authority (required for any FCC license based wireless business)" and with "equipment providers, financiers, partners for building and operating wireless systems, and end users of FCC licenses and licensed wireless services." Defendants allegedly knew of the these relationships and intentionally interfered with them by engaging in essentially all the same wrongful acts alleged as part of the license warehousing scheme.

The fraud and negligent misrepresentation causes of action repeated a variation of the license warehousing scheme by alleging that defendants intentionally or negligently stated in renewal applications that they had complied with construction requirements, had submitted station activation notices to the FCC for stations that were not constructed, and in response to the 2004 FCC audit

had falsely stated they had timely constructed stations. Plaintiffs further alleged that, in fact, a major percentage of defendants' licenses had been terminated by operation of law, and should have been surrendered to the FCC for cancellation in its public licensing database. Plaintiffs alleged they reasonably relied upon defendants' explicit and implicit misrepresentations. Consequently they refrained from or were otherwise blocked from seeking and obtaining from the FCC spectrum licensed to defendants and licenses to spectrum elsewhere in the nation.

The unfair competition causes of action incorporated all the preceding allegations of wrongful acts and alleged that all defendants' "acts and omissions" regarding "licenses cancelled as a result of the FCC's 2004 audit" and with respect to the challenged licenses, constituted unlawful, unfair or fraudulent business practices in violation of Business and Professions Code section 17200.

The interference with contract cause of action also was predicated upon allegations that defendants made specific false representations about title to certain licenses and about the degree to which their site-based licenses encumbered plaintiffs' licenses.

Finally, the cause of action for conversion alleged that defendants, by failing to comply with the FCC construction and coverage requirements, and failing to timely report their failure to comply, had exercised control over spectrum that belonged to plaintiffs. They alleged the spectrum over which defendants wrongfully retained control should have reverted to plaintiffs

to the extent they held geographic licenses encumbered by defendants' site-based licenses.

Plaintiffs further alleged they were damaged by defendants' license warehousing scheme because it prevented them from applying for, or obtaining, licenses for spectrum covered by defendants' site-based licenses that defendants should have surrendered. Absent the license warehousing scheme, plaintiffs alleged the spectrum defendants hoarded would have been available for plaintiffs to bid on. Defendants' conduct therefore interfered with plaintiffs' ability to successfully bid on licenses "in the first and second AMTS auction[s]" of geographic licenses, and "blocked" plaintiffs from "seeking and obtaining from the FCC the spectrum in the [d]efendants' [l]icenses and elsewhere in the United States."

**Procedural History and Grounds for the Demurrers**

Prior to the filing of the above described second amended complaint, defendants successfully demurred to all the causes of action alleged in the first amended complaint. The court sustained the demurrers on the ground that "the claims . . . come within the express preemption clause of the [FCA] at . . . section 332(c)(3)(A). Adjudication of the state claims pled in the [first amended complaint] would require the [c]ourt to determine whether or not [d]efendants' site based licenses remained valid or were terminated and thus necessarily implicate the regulation of 'entry' into the mobile service market. (See *TPS Utilicom Services, Inc. v. AT&T Corp.* (C.D. Cal. 2002) 223 Fed.Supp.2d 1089, 1108 *(TPS Utilicom).)*" The court, citing a footnote in *TPS*

*Utilicom,* gave leave to amend "to allege facts sufficient to show that the [FCC] has finally determined" the defendants "wrongfully retained canceled licenses."

In an attempt to cure the defects identified in that order, plaintiffs created the two categories of licenses "cancelled licenses" and "challenged licenses," and bifurcated their tort causes of action into two separate causes of action distinguished only by the category of licenses to which the cause of action allegedly applied.

The only other difference between the first and second amended complaints was the addition of the allegation that, in certain states where defendants "purport[] to own and operate AMTS CMRS Stations," defendants had also failed to register as entities doing business within the states, and failed to collect surcharges and other taxes from alleged customers and failed to obtain and maintain "required legal access" to physical antenna structures, and other infrastructure necessary for "actual construction . . . of its alleged still-valid AMTS stations."

Defendant PSI again filed a demurrer to the second amended complaint contending the second amended complaint failed to state a cause of action because the state claims were preempted by section 332(c)(3)(A) of the FCA. It also filed a request for judicial notice of several FCC orders and pleadings addressing many of the same issues plaintiffs raised in the complaint. PSI argued that these records demonstrated that some of plaintiffs' claims with respect to what plaintiffs characterized as "cancelled licenses" were still the subject of ongoing

proceedings before the FCC.

Defendants Mobex and Maritime (collectively the Mobex defendants) also demurred on the ground that the causes of action were preempted by section 332(c)(3)(A) of the FCA. In addition, the Mobex defendants advanced numerous reasons why, even if the claims were not preempted, plaintiffs failed to state any viable cause of action under state law. The Mobex defendants also filed a request for judicial notice of records of proceedings before the FCC in which plaintiffs had raised many of the same charges of license warehousing, defective station activation, coverage failures, improper bidding and other allegedly improper conduct.

Plaintiffs responded with their own request for judicial notice of FCC orders and records of proceedings before the FCC that they argued would demonstrate defendants did not timely disclose that some of their licenses had automatically terminated.

**Order Sustaining the Demurrers Without Leave to Amend**

At the hearing on the demurrers, the court stated the allegations regarding failure to pay state taxes and fees "appeared . . . to just be allegations thrown in to try to get around the defect that I pointed out at the last hearing." Even with these allegations, the court stated that, read as a whole, "the thrust and the gist of this action is alleged state law claims based upon licenses that automatically terminated and were wrongfully retained so as to warehouse licenses and hoard spectrum."[4] The court

[4] The court also noted that the only cause of action that related the failure to pay taxes to any specific elements was the

explained the changes in the second amended complaint did not cure the essential problem, i.e., "that we still have a case that is founded upon licenses which allegedly automatically terminated and allegedly were wrongfully retained by . . . defendants." The court concluded the state claims were preempted because: "[t]hey regard maintenance of licenses, [and] entry into the market."

The court granted the requests for judicial notice, and sustained defendants' demurrers to each cause of action alleged in the second amended complaint on the ground that "the claims set forth in the [second amended complaint] come within the express preemption clause of the [FCA] at . . . [section] 332(c)(3)(A)" because "[a]djudication of the state claims ... would necessarily implicate the regulation of 'entry' into the mobile service market."

The court entered a judgment of dismissal in defendants' favor, and plaintiffs filed a timely notice of appeal.

## II. ANALYSIS

### 1. Standard of Review

Our review of the trial court's ruling on the demurrer is governed by well-settled principles. "A general demurrer challenges only the legal sufficiency of the complaint, not the truth or the

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Cartwright Act claim, and questioned whether, even if not preempted, the failure to pay taxes is a violation of antitrust law. Plaintiffs' counsel was unable to provide the court with a case to support the proposition but responded. "[I]n this case when there was a pattern of operating sham entities, and that as a result of them being sham entities they were violating state law . . . it constitutes anticompetitive conduct."

accuracy of its factual allegations or the plaintiff's ability to prove those allegations." *(Ball v. GTE Mobilnet of California* (2000) 81 Cal.App.4th 529, 534535 *(Ball))* We therefore deem all material facts properly pleaded to be admitted, but need not accept contentions, deductions or conclusions of fact or law. We may also consider matters that are judicially noticed. *(Zelig v. County of Los Angeles* (2002)
27 Cal.4th 1112, 1126.) In determining whether the complaint states a cause of action we must give it a reasonable construction, reading all the allegations in context, and affirm the judgment if it is correct on any ground stated in the demurrer, regardless of the trial court's stated reasons. *(Aubry v. Tri-City Hospital Dist.* (1992) 2 Ca1.4th 962, 967.)

Our review of the legal sufficiency of the complaint is de novo, "i.e., we exercise our independent judgment about whether the complaint states a cause of action as a matter of law." *(Montclair Parkowners Assn. v. City of Montclair* (1999) 76 Cal.App.4th 784, 790.)

**2. The Enactment of Section 332(c)(3)(A) and Summary of Cases Defining the Scope of Preemption**

The right to obtain and use radio frequencies is regulated in the United States by the FCC acting pursuant to its authority created by the FCA. (§ 151 et seq.) The overall intent of the FCA is "to maintain the control of the Untied States over all the channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by [f]ederal authority." (§ 301.) To this end,

the FCC regulates the airwaves by acting as the exclusive authority for the award of licenses, and regulating a comprehensive scheme for competitive bidding. (§§ 307, 309(j)(3))

Section 332(c)(3)(A) is an *express* preemption provision declaring: "[N]o State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services." (§ 332(c)(3)(A).) The general purpose of this preemption clause is "to achieve nationwide uniformity in telecommunications regulation." *(Bastien v. AT&T Wireless Services, Inc.* (7th Cir. 2000) 205 F.3d 983, 988-989 *(Bastien).)* "For purposes of [section] 332(c)(3)(A), state regulation of entry includes lawsuits and state judicial actions." *(TPS Utilicom, supra,* (2002) 223 F.Supp.2d at p. 1108.)

"Section 332(c)(3)(A) is part of the 1993 amendments to the Communications Act of 1934 (§ 151 et seq.) (Omnibus Budget Reconciliation Act of 1993, Pub.L.No. 103-66, § 6002(b)(2)(A) (Aug. 10, 1993), 107 Stat. 312, 393." *(Spielholz v. Superior Court* (2001) 86 Cal.App.4th 1366, 1372.) Congress enacted section 332(c)(3)(A) in the face of new regulatory challenges posed by the technology of wireless commercial mobile radio services as opposed to traditional landline technology. "As Congress became more aware of the barriers to entry and obstacles to growth presented by state regulation, it moved toward providing unequivocal federal authority to the FCC to foster development of this

unique wireless medium" (Kennedy & Purcell, *Section 332 of the Communications Act of 1934: A Federal Regulatory Framework That Is "Hog Tight, Horse High, and Bull Strong"* (1998) 50 Fed.Comm. L.J. 547, 559). In response to this changing technological landscape, "[i]n 1993, Congress amended the Communications Act to create a new regulatory class called 'commercial mobile radio service.' . . . The amendment granted the federal government exclusive authority to regulate the 'rates charged' and 'entry' of wireless carriers." *(National Ass 'n of State Util. Cons. Adv. v. F. C. C.* (11th Cir. 2006) 457 F.3d 1238, 1242.)

Section 332(c)(3)(A), by its express terms precludes state or local government regulation of "rates" or "the entry of mobile service providers into the market. At the same time, it expressly limits the scope of federal preemption to those two areas, and reserves the right of the states to regulate "other terms and conditions" of the provision of mobile services. (See, e.g., *Moriconi v. AT&T Wireless PCS, LLC* (E.D. Ark. 2003) 280 F.Supp.2d 867, 873-874.)

Therefore, in determining whether the causes of action alleged in the second amended complaint are preempted, the primary question we must resolve is whether the causes of action in the second amended complaint intrude upon the area reserved to the federal government and the FCC, i.e., regulation of "rates" and market "entry," or whether, as plaintiffs contend, the causes of action impact only "other terms and conditions," that Congress expressly left to the states to regulate.

The touchstone of any inquiry into the scope of

the statute's preemptive effect is congressional intent. (*Altria Group, Inc.* v. *Good* (2008) U.S. [129 S.Ct. 538, 543].) "Congressional intent regarding the appropriate division of the regulatory authority of federal and state governments under the FCA is reflected by the following House of Representatives' report: 'Section 332(c)(3) provides that state or local governments cannot impose rate or entry regulation on private land mobile service or commercial mobile services; this paragraph further stipulates that nothing here shall preclude a state from regulating the other terms and conditions of commercial mobile services. It is the intent of the Committee that the states still would be able to regulate the terms and conditions of these services. By "terms and conditions," the Committee intends to include such matters as customer billing information and practices and billing disputes and other consumer protection matters; facilities siting issues (e.g. zoning); transfers of control; the bundling of services and equipment; and the requirement that carriers make capacity available on a wholesale basis or such other matters as fall within a state's lawful authority. This list is intended to be illustrative only and not meant to preclude other matters generally understood to fall under "terms and conditions." ' (H.R.Rep. No. 103-111, § 5205 (1993), reprinted in 1993 U.S. Code Cong. & Admin. News pp. 378, 588.)" (*Moriconi v. AT&T Wireless PCS, LLC, supra,* 280 F.Supp.2d at pp. 873 -874.)

Most cases applying section 332(c)(3)(A) to determine whether state law causes of action are preempted have focused on the question whether

specific state law causes of action regulate "rates," not whether state claims regulate market "entry." Although the parties agree the issue in this case is whether the causes of action in the second amended complaint seek to regulate market entry, not rates, we briefly summarize these cases because they help define the standard for assessing whether a state claim intrudes upon a preempted area under section 332(c)(3)(A), or instead concerns "other terms and conditions," which Congress intended to allow the states to regulate.

As a general rule, these cases hold state law claims challenging the *setting* or *reasonableness* of rates are preempted, but claims alleging the nondisclosure or false representation of rates, or challenging billing practices not directly related to rates concern "other terms and conditions," that Congress intended to allow the states to regulate, and are not preempted. For example, in *Ball, supra,* 81 Cal.App.4th 529 the plaintiffs alleged causes of action for violation of Business and Professions Code section 17200 against every major provider of cellular phone services based upon charges for time when the customer was not actually talking, including for time rounded up to the next full minute and for ringing time. The plaintiffs sought restitution of all amounts overpaid and an injunction against these practices. The trial court sustained demurrers without leave to amend on the ground that the plaintiffs' causes of action were preempted by section 332(c)(3)(A). (*Ball,* at p. 533.)

The Court of Appeal upheld the order

sustaining the demurrer with respect to the plaintiffs' claims challenging charges for noncommunication time. It reasoned that regulation of "rates" includes not only the rate *level* but also the method of measuring the length of a call. Since the plaintiffs' claims challenged the reasonableness of the latter rate component and sought restitution of amounts they contended were overpaid, the court concluded their claims were, to that extent, preempted as intruding upon the federally reserved area of rate regulation. (*Ball, supra,* 81 Cal.App.4th at pp. 535-540.)

The court, however, also held section 332(c)(3)(A) did not preempt plaintiffs' state law claims based upon an alleged *failure to disclose* to the consumer a particular rate or rate practice, because if successful, these claims would only require full and accurate *disclosure,* and therefore would not intrude upon the setting or assessment of the reasonableness of rates. The court reasoned that claims seeking only full disclosure concerned an issue of consumer protection falling in the category of "other terms and conditions" that Congress intended to allow states to regulate. The court held the plaintiffs should have been granted leave to amend their unfair competition claims to seek injunctive relief based only upon inadequate *disclosure* of the challenged charges. It therefore reversed the judgment with directions to allow such an amendment. (*Ball, supra,* 81 Cal.App.4th at pp. 543-544.)

The courts have also clarified that a state claim is not preempted simply because the plaintiff seeks damages that may incidentally or indirectly

have an effect on rates charged. For example, in *Spielholz v. Superior Court, supra,* 86 Cal.App.4th 1366, the court issued a writ directing the trial court to vacate its order striking a demand for monetary relief including damages and restitution. The substance of the plaintiffs' state law claims challenged the defendants' false advertising to consumers of a seamless calling area, and failure to disclose dead zones. (*Id.* at pp. 1369-1370, 1381-1382.) The Court of Appeal accepted the distinction the FCC drew between " 'an outright determination of whether a price charged . . . was unreasonable,' which would be preempted, and the determination of 'whether . . . there was *a difference between promise and performance*' in the context of false advertising or breach of contract, which would not be preempted." (*Id.* at p. 1370, quoting *In re Wireless Consumers Alliance, Inc.* (2000) 15 F.C.C.R. 17,021 TT 25 26.) The court held that "[i]f the principal purpose and direct effect of a remedy are to prevent false advertising and compensate an aggrieved customer, any prospective or retrospective effect on rates is *merely incidental* . . . even if the court determines the value of services provided in awarding damages or restitution." (*Spielholz v. Superior Court,* at pp. 1375-1376, italics added.) The court concluded that since the principal purpose and direct effect of the plaintiffs' damages claim was not to challenge rates but to remedy false advertising, it was a matter normally falling under "other terms and conditions" left to the states, and was not preempted. (*Id.* at pp. 13751376.)

The foregoing cases illustrate that, in determining whether state claims are preempted, the critical question is not the "form of the state

claim or remedy," but rather the substance of the claims. (*In re Wireless Consumers Alliance, Inc., supra,* 15 F.C.C.R. 17,021 ¶ 28.) In other words, section 332(c)(3)(A) preempts a state claim only if it "necessarily treads upon the federally-reserved area" of rates and market entry. (*Fedor v. Cingular Wireless Corp.* (7th Cir. 2004) 355 F.3d 1069, 1072 *(Fedor).)*

The courts have applied a similar approach when assessing whether state law claims are preempted as state regulation of "market entry." In *Bastien, supra,* 205 F.3 d 983, AT&T Wireless, "a subsidiary of AT&T, entered the market in the late 1990s, after receiving approval of its rates and infrastructure arrangements from the [FCC], as required by federal law. (See 47 C.F.R. § 24.1 et seq.) To encourage new market entrants, the FCC allows service providers to begin operations in an area before it has fully built out its network. For this reason, the service provided by AT&T Wireless in 1998 was far from flawless." *(Id.* at p. 984.) A customer sued AT&T wireless for breach of contract and violation of a state consumer fraud law based upon AT&T signing up customers without first building adequate cellular towers and other infrastructure.

The Seventh Circuit acknowledged these claims were cast in terms of state contract and consumer protection law. Nonetheless, it held the state claims were preempted because, if successful, they would have compelled the defendants to build infrastructure the FCC did not require as a condition of market entry, or to pay damages for failing to do so. It held: "These claims tread directly

on the very areas reserved to the FCC: the modes and conditions under which AT&T Wireless may begin offering service in the Chicago market. The statute [section 332(c)(3)(A)] makes the FCC responsible for determining the number, placement and operation of the cellular towers and other infrastructure, as well as the rates and conditions that can be offered for the new service. Should the state court vindicate Bastien's claim, the relief granted would necessarily force AT&T Wireless to do more than required by the FCC: to provide more towers, clearer signals or lower rates. The statute specifically insulates these FCC decisions from state court review." (*Bastien, supra,* 205 F.3d at p. 989.)

In a subsequent decision, *Fedor, supra,* 355 F.3d 1069, the Seventh Circuit emphasized that examination of the substance of the plaintiffs claims must be based upon a reasonable construction of the complaint, and that section 332(c)(3)(A) does not preempt a state claim simply because it "touches on" the federally-reserved areas of market entry or rate regulation "in any manner." (*Fedor,* at p. 1072.) Fedor had purchased a plan entitling him to a certain monthly allotment of airtime minutes for a flat rate, and additional charges for excess minutes. He brought causes of action for breach of contract, breach of the covenant of good faith and fair dealing, consumer fraud and unjust enrichment based upon the defendant's practice of billing for some minutes in a month other than the month in which the minutes were incurred. (*Id.* at pp. 1070-1071.) The defendant characterized these claims as treading upon the area of market entry. They argued that, by analogy to *Bastien,* the

plaintiff's claims, if successful, would "necessarily require" Cingular to build towers in areas where it did not already have them because delays in billing for "roaming" minutes occurred when Cingular had to wait for operators of towers outside the service area to provide Cingular with the billing information. Cingular asserted it would have to build its own towers to avoid these delays. It concluded the plaintiff's state claims therefore trod upon the federally-reserved area market entry regulation and were preempted. (*Fedor*, at pp. 1072, 1074-1075.)

The Seventh Circuit rejected Cingular's argument because it stretched "the allegations of the complaint beyond recognition." (*Fedor, supra,* 355 F.3d at p. 1074.) It pointed out that the plaintiff's claims did not challenge *delays* in billing, but rather the month to which those minutes were allocated once they were billed. Therefore the complaint actually raised "an accounting problem, not an infrastructure problem." (*Ibid.*) It concluded the plaintiff's claims were not preempted because if plaintiff was successful Cingular would only have to conform its billing practices to the promises it made to consumers by contract.

Further delineation of the type of state claims that intrude upon federal regulation of market entry is provided by the decision in *TPS Utilicom, supra,* 223 F.Supp.2d 1089. The plaintiff alleged that AT&T had used a shell company to enter an auction in which AT&T would not otherwise have been eligible to participate. The plaintiff further alleged that AT&T's participation raised the amounts bid for licenses thereby making it more difficult for smaller

companies like the plaintiff to bid successfully. Based upon these allegations, the plaintiff alleged state law claims for unfair competition and interference with prospective advantage. (*Id.* at pp. 1093-1094, 1096.)

The court held these causes of action, at their core, intruded upon the federally-reserved area of regulation of market entry because "[e]ntry into the wireless communication market requires access to the FCC license [and] [t]he manner by which a party may acquire such a license is determined by the FCC." (*TPS Utilicom, supra,* 223 F. Supp.2d at p. 1108.)

The court explained: "TPS's claims are an attempt to regulate entry into the market for wireless communication by challenging the FCC eligibility criteria for competitive bidding on wireless licenses. The claims fall within the express preemption at [section] 332(c)(3)(A). The criteria for participation in the auctions for 'commercial mobile service' are established by the FCC pursuant to its authority under title 47 and as set forth by FCC regulation at [title 47 Code of Federal Regulation] sections 1.21011.2113. Whether or not TPS seeks to 'invalidate' the licenses acquired by the [d]efendants in this auction is irrelevant." (*TPS Utilicom, supra,* 223 F.Supp.2d at p. 1108.)

"Entry to the wireless communication market requires access to the FCC license. The manner by which a party may acquire such a license is determined by the FCC. The express preemption at [section] 332(c)(3)(A) prevents second guessing of the FCC auction participation criteria by challenge under state law. The structure of the act confirms

this analysis. (See, e.g., . . . §§ 307(a)-(c) [authority to issue licenses]; 308(a)-(b) [requirements for licenses]; 309(j)(3) [specifying comprehensive scheme of competitive bidding for licenses].) The act further provides the FCC with a disciplinary mechanism for resolving disputes over eligibility and license awards. (See, e.g., .. . §§ 208(a) [investigation of complaints]; 209 [award of damages]; 303(m)(1) [license suspension]; 309(a) [specifying review process for parties who disagree with FCC licensing determinations]; 309(d) [party that objects to an FCC eligibility determination can file a petition with the FCC to deny the license]; 312 [license revocation].) The two claims in this action are an attempt to challenge the FCC eligibility determinations under state law. Those challenges are expressly preempted." *(TPS Utilicoin, supra,* 223 F.Supp.2d at pp. 1108-1109.)

In sum, state claims that, in substance, directly "tread upon" the federally-reserved areas of rates and market entry regulation, including setting and reasonableness of rates, the auction bidding process, licensing determinations, and infrastructure requirements are preempted. By contrast, state claims challenging only inadequate disclosure to consumers of rates or billing practices, or a disparity between a promise of service and performance, or false advertising, concern "other terms and conditions" that Congress intended to allow states to regulate. The latter type of state law claims are not preempted despite the possibility that success of such claims in the form of a damage award or other monetary relief may *incidentally* affect rates by increasing costs.

3. **Application of Section 332(c)(3)(A) to the**

Applying the foregoing principles, we have no difficulty concluding that, to the extent that the causes of action alleged in the second amended complaint were based upon allegations that defendant Maritime obtained a bidding credit to which it was not entitled, they are clearly preempted. A state claim by one bidder against another challenging the eligibility of a competitor to participate in an auction or to benefit from auction credits is "purely a question of federal law as administered by the FCC." *(TPS Utilicoin, supra,* 223 F.Supp. 2d at p.1108.) Therefore to the extent each of the state causes of action was based upon these allegations, it directly treads upon an issue of market entry and is preempted.[5] *(Ibid.)*

The next, and dispositive, question is whether the remainder of license warehousing scheme allegations upon which the causes of action are based intrude upon federal regulation of "entry" to the market. (§ 332(c)(3)(A).) Plaintiffs assert their state causes of action based upon these allegations do not tread upon federal regulation of market "entry" because plaintiffs do not challenge the *initial grant* of licenses to defendants. Instead, they challenge only defendants' wrongful retention or renewal of licenses that plaintiffs contend automatically terminated as a result of failure to

[5] We also note that plaintiffs had specifically challenged the use of this credit in a proceeding before the FCC. Although the FCC adjusted the credit it also ruled that plaintiffs were not harmed in the bidding process. Irrespective of the outcome, the prior proceeding addressing the issue before the FCC illustrates that this type of claim falls directly in the area of market entry regulation.

comply with FCC rules regarding construction within a specified period. Plaintiffs do not, however, cite any authority for the proposition that federal regulation of "entry" to the market begins and ends with the initial grant of a license.

The distinction plaintiffs attempt to draw between initial licensing and renewal, revocation, or termination of licenses is illogical and inconsistent with the purpose of section 332(c)(3)(A) to ensure uniformity in the law applicable to mobile service providers with respect to market entry. A license is a *prerequisite* to market entry. (*TPS Utilicom, supra,* 223 F.Supp.3d at p. 1108.) As is the case with an initial grant of a license, a subsequent renewal, revocation or termination of a license determines access of the holder, and of other bidders or potential bidders to a license and the spectrum covered by it and therefore necessarily is also an issue of market entry. Uniformity in the regulation of market entry could not be achieved by limiting preemption of state regulation to the procedure, terms, and conditions for an initial grant of a license, yet allowing state regulation of the procedure and terms or condition with respect to the renewal, termination or revocation of licenses.

That the intended scope of federal control over market entry is not limited to the initial licensing decision is also illustrated by the comprehensive statutory scheme created by the FCA giving the FCC authority to resolve disputes over eligibility and license awards. (See, e.g., §§ 208(a) [investigation of complaints]; 209 [award of damages]; 303(m)(1) [license suspension]; 309(a) [review process for parties who disagree with FCC

licensing determinations]; 309(d) [party that objects to an FCC eligibility determination can file a petition with the FCC to deny the license]; and 312 [license revocation].) The scope of this authority strongly suggests that control over disputes and decisions beyond the initial grant of a license are essential to the federal regulation of market "entry." In fact, the FCC orders and other pleadings that the trial court judicially noticed reflect that plaintiffs availed themselves of many of the above described procedures to raise many of the same issues they now attempt to cast as state law claims.

Moreover, the FCA itself specifically identifies the warehousing of licenses as a potential barrier to market entry and development and use of spectrum in the public interest by requiring the FCC to adopt rules "to prevent stockpiling or warehousing of spectrum by licensees." (§ 309(j)(4)(B).) The important role of these rules in the regulation of market entry is illustrated by plaintiffs' own allegations throughout their second amended complaint that the primary effect of defendants' license warehousing scheme was to deny them and other potential market entrants access to the hoarded spectrum.

We also reject plaintiffs' contention that the distinction they attempted to draw between "cancelled licenses" and "challenged license," avoids preemption. After the court sustained demurrers to the first amended complaint, plaintiffs created these categories, and separate causes of action based upon them in an attempt to avoid dismissal based upon preemption. They did so in reliance upon a footnote in *TPS Utilicom, supra,*

223 F.Supp.2d 1089 suggesting that the preempted state claims in that case, "might escape FCA preemption" if they were brought "*after* a determination that a party had wrongfully participated in an FCC license auction." (*Id.* at p. 1109, fn. 19.) Plaintiffs argue that at least to the extent their license warehousing scheme allegations were incorporated in the causes of action relating only to "cancelled licenses," their claims should not be preempted because the FCC had already determined that those licenses should be cancelled or terminated.[6]

We find the contention unpersuasive for two reasons: First, the footnote in *TPS Utilicom* described a hypothetical not before the court. It therefore is dictum. Second, and more fundamentally, the footnote confuses the doctrine of comity between courts and agencies known as "primary jurisdiction," with preemption. Primary jurisdiction " '*applies where a claim is originally cognizable in the courts,* and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the

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[6] The trial court also was apparently relying upon this footnote in *TPS Utilicom, supra,* when it sustained the demurrer to the first amended complaint, but granted leave to amend "to allege facts sufficient to show that the [FCC] has filially determined that . . . [d]efendants wrongfully retained canceled licenses." As we shall explain that footnote is premised upon a confusion of the principles of federal preemption with the doctrine of primary jurisdiction.

administrative body for its views.' [Citations.]" (*Farmers Ins. Exchange v. Superior Court* (1992) 2 Cal.4th 377, 390.) But where, as here, and in *TPS Utilicom*, the state claims are expressly *preempted* the state law claims are simply *not cognizable in state court at all*, not because of deference to the special expertise of an agency, but because Congress has expressed its intent through enactment of section 332(c)(3)(A), under the Supremacy Clause (U.S. Const., art VI, § 2) to preclude any state regulation in this particular area. Therefore, for purposes of analyzing the issue of preemption, it is irrelevant whether the FCC has rendered a final decision because, *regardless of any pending or final action by* the FCC, the state is simply precluded from regulating in the area.[7]

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[7] After the court sustained the demurrer to the first amended complaint, plaintiffs filed a request to stay the proceedings based upon the doctrine of primary jurisdiction, and attached an approximately 440-page table of ongoing proceedings before the FCC in which plaintiffs were challenging defendants' licenses. If the plaintiffs' claims were not preempted, this might have been an appropriate case in which to stay the proceedings until the FCC could render final decision on many of the issues within the agency's special expertise, such as: (1) whether and with respect to which licenses did defendants fail to satisfy construction and coverage requirements, (2) whether this failure did result in *automatic* termination or whether the FCC had discretion to, and would grant a waiver, or extend the period, and (3) whether defendants' retention of licenses that plaintiffs contended should have been surrendered or cancelled actually harmed plaintiffs in the bidding process of any of the auctions in which plaintiffs participated. Resolution of these issues involves technical or policy considerations within the agency's field of expertise. Moreover, as the complaint itself recognized many of the

The irrelevance of an FCC final decision to the preemption analysis is illustrated by the recent decision in *Telesaurus VPC, LLC v. Randy Power* (D.Ariz. 2009) WL 273295.[8] In that case, Telesaurus, also one of the plaintiffs in this case, filed state tort causes of action including conversion and interference with prospective advantage based upon allegations the defendant improperly obtained a license to spectrum frequencies the FCC had previously awarded to the plaintiff. The FCC had already issued an order resolving the conflict by deleting the disputed frequencies from defendants license. The court nonetheless held the state claims were preempted because they intruded upon federal regulation of market entry, and granted the motion to dismiss them.

In any event, as the trial court in the present case noted at the hearing and in its order sustaining the demurrer, the only final FCC determination alleged was with respect to the category of

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challenged licenses were already the subject of ongoing administrative challenges, creating "a substantial danger of inconsistent rulings." (*Ellis v. Tribune TV Co* (2d Cir. 2006) 443 F.3d 71, 8283.) If, however, the causes of action are preempted, there is no point in staying the matter until the FCC renders a final decision on these issues because the state claims are simply not cognizable in court at all. The complaint would have to be dismissed on preemption grounds even if the FCC had rendered final decisions on theses issues. The court, therefore, properly never reached the request for a stay, and instead denied it as moot, because the causes of action were preempted

[8] Although the *Telesaurus* case is pending before the Ninth Circuit Court of Appeals, it remains federal authority and is available for our consideration.

"cancelled licenses." The second amended complaint alleged that "cancelled licenses" had automatically terminated, and had been "identified by the FCC as cancelled." Yet, the license warehousing scheme alleged in the complaint did not end with the assertion that many of defendants' licenses had automatically terminated. Plaintiffs alleged defendants had acquired both "cancelled" and "challenged" licenses with the intent to warehouse them, had retained them knowing that they failed to comply with FCC construction and coverage requirements, had intentionally misrepresented to the FCC and to potential competitors and bidders the status of their compliance with the construction and coverage requirements and other terms of their licenses, and had concealed their violations of the FCC anti-warehousing rules. According to plaintiffs, all of the foregoing conduct had the effect of interfering with the exercise of their own licensing rights, and either deterred them from making, or interfered with their ability to make, successful bids in two FCC auctions of geographic licenses. The allegation that the FCC made a determination in the 2004 audit that some licenses had automatically terminated and should have been canceled falls far short of reaching these broader allegations of wrongful conduct with respect to both the "cancelled" and the "challenged licenses."[9] Thus, even if the existence of a final decision by

[9] With respect to the "challenged licenses" which represented the majority of the licenses at issue, there was no allegation that the FCC had rendered a final decision on *any* issue. To the contrary, the second amended complaint alleged these licenses were "subject to ongoing administrative proceedings before the FCC."

the FCC with respect to plaintiffs' allegations of wrongful conduct could have avoided the preemption defense, the second amended complaint failed to allege that the FCC had rendered such a decision.

Nor did the addition of allegations in the second amended complaint concerning defendants' failure to pay state taxes and fees succeed in defeating the preemption defense as a ground for sustaining defendants' demurrers. If considered in the abstract, an allegation of violations of state tax laws would not appear to tread upon an issue of federal regulation of entry into the wireless communication services market. Nonetheless, an examination of these allegations, in context of the whole complaint, demonstrates that the alleged failure to pay state taxes and fees was premised upon, and simply another variation of the licensing warehousing scheme allegations. Plaintiffs alleged each defendant failed to pay state taxes and fees in states where that defendant "*purports* to own and operate AMTS CMRS Stations not previously canceled by the FCC." (Italics added.) They further alleged defendants had failed to register as out of state entities doing business in the states; failed to collect state surcharges and other taxes from "*alleged* customers"; and failed to obtain and maintain "required legal access" to physical antenna structures, and other infrastructure necessary for "actual construction of its alleged still-valid AMTS stations." Thus the allegations of failure to comply with state tax laws were based upon the assertion that defendants were operating as "sham entities" in these states where they held licenses and purported to be operating CMRS stations, but according to

plaintiffs actually were not. The underlying premise of these claims therefore, was also that defendants were wrongfully retaining licenses despite having failed to comply with FCC construction and coverage requirements, and they were operating these sham entities to conceal that failure.

We conclude that neither the attempted distinction between cancelled and challenged licenses, nor the addition of general allegations of violations of state tax laws based upon the alleged failure to comply with FCC rules applicable to licenses avoids the conclusion that the state law causes of action alleged in the second amended complaint are preempted by section 332(c)(3)(A). All of the state law causes of action tread upon federal regulation of market entry, because they were based upon allegations challenging defendants' retention or renewal of licenses that plaintiffs contended should have been automatically terminated based upon defendants alleged noncompliance with FCC rules concerning construction and coverage, or violations of other rules against warehousing and stockpiling of licenses, and allegations that the effect of this conduct was to undermine the fairness and outcome of bidding in two FCC auctions.

**4. Savings Clauses**

Section 414 of the FCA provides: "Nothing in this Chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." (§ 414.)

Plaintiffs argue the court erred in finding their claims preempted because this "savings clause" specifically preserves their state law claims based upon the license

warehousing allegations. They are wrong. In *Ball, supra,* 81 Cal.App.4th at page 539 the court rejected the identical contention. The plaintiff in that case argued state claims the court found were expressly preempted by section 332(c)(3)(A) were nonetheless preserved by this savings clause. The court held that a " '[a] general "remedies" savings clause cannot be allowed to supersede [a] specific substantive preemption provision'—this would render the preemption provision meaningless." *(Ball,* at p. 540.) We agree with *Ball* that this savings clause preserves only state law claims or remedies that *are not otherwise expressly preempted by section 332(c)(3)(A).*

None of the cases plaintiffs rely upon compel a different conclusion because they do not address the question whether state law claims that are expressly preempted pursuant to section 332(c)(3)(A) could nonetheless be preserved by section 414. (See *Cooperative Communications Inc. v. AT&T Corp.* (D. Utah 1994) 867 F.Supp. 1511, 1515 [court *without any reference to express preemption based upon section 332(c)(3)(A)* addressed the question whether state claims were *impliedly* preempted by the FCA because the comprehensive statutory scheme evinced intent to "occupy the entire field"].) The other two decisions plaintiffs cite, *Bruss Co. v. AllNet Communication Services, Inc.* (N.D. Ill. 1985) 606 F.Supp. 401 and *Financial Planning Inst., Inc. v. American Tel.&Tel. Co* (D.Mass. 1992) 788 F.Supp. 75 also involved only issues of implied preemption. Moreover, these two decisions were decided in 1985 and 1992

before Congress enacted section 332(c)(3)(A). "Absent an express congressional statement, state law may be preempted in two situations: first, if the state law actually conflicts with federal law, [citations]; or second, if federal law so thoroughly occupies a legislative field ' "as to make reasonable the inference that Congress left no room for the States to supplement it." ' [Citations.]" (*Cooperative Communications, Inc. v. AT&T Corp., supra,* 867 F.Supp. at p. 1515.) Since Congress *expressly* stated its intent to preempt state law when it added section 332(c)(3)(A) in 1993, the forgoing cases upon which plaintiffs rely analyzing whether congressional intent to preempt may be implied are inapplicable to the issue before us, i.e., whether the savings clause set forth in section 414 was intended to permit state law clams that are expressly preempted by section 332(c)(3)(A).

In the absence of citation to any persuasive contrary authority on point, we choose to follow the explicit holding in *Ball, supra,* that Congress did not intend this savings clause to supersede the express preemption it declared in section 332(c)(3)(A).

Plaintiffs' reliance upon another savings clause included in the Telecommunications Act of 1996 as support for the proposition that at least their cause of action for violation of the Cartwright Act is not preempted is also misplaced. "Section 601(b) of the 1996 Act is an antitrust-specific saving clause providing that 'nothing in this Act or the amendments made by this Act shall be construed to modify, impair or supersede

the applicability of the antitrust laws.' (110 Stat.143, 47 U.S.C, § 152 . . . .)" *(Verizon Communications, Inc. v. Law Offices of Curtis Trinko* (2004) 540 U.S. 398, 406 *(Trinko)*.[10]

Setting aside the question whether the reference in section 601(b) to "antitrust laws" includes state laws such as the Cartwright Act, plaintiffs misstate the holding in *Trinko*. They assert *Trinko* interpreted section 601(b) to mean that "antitrust claims are not preempted generally under the FCA." To the contrary, *Trinko* did not involve a question of preemption of state law, and the court did not even discuss whether section 601(b) amended, limited or modified the scope of preemption previously expressly declared in section 332(c)(3)(A). Instead, the court addressed the very different question whether an alleged breach of certain duties created by the Telecommunications Act of 1996 could be enforced by a *federal* antitrust claim. The court interpreted section 601(b) to bar application of the doctrine of implied immunity which shields regulated entities from liability upon a convincing showing of clear repugnancy between the antitrust laws and the regulatory system. *(Trinko,*

[10] The focus of the Telecommunications Act of 1996 was "the entrenched local monopolies held by incumbent local exchange carriers." (Kennedy & Purcell 150 Fed.Comm. L.J. 547, 570.) Again, those commentators opine that "nothing in the 1996 Act undercuts the 'hog tight, horse high, and bull strong' federal regulatory framework predicated upon . . . section 332(c)(3) . . . in fact section 601(c)(1) of the 1996 Act states that Congress did not intend to amend existing law, such as the 1993 Act. Congress provided: 'This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede federal, state, or local law unless expressly so provided in such Act or amendments.' " *(Ibid.*, fn. omitted.)

*supra*, 540 U.S. at pp 406-407; see also *United States v. National Ass'n of Securities Dealers, Inc.* (1975) 422 U.S. 694, 719-720 [defining implied immunity].) In the absence of citation to any authority that supports plaintiffs' novel interpretation, we conclude that section 601(b) did not amend, limit or modify the scope of preemption Congress previously expressly declared in section 332(c)(3)(A).

## III. DISPOSITION

For the foregoing reasons we conclude the court did not err in sustaining defendants' demurrers without leave to amend as to all causes of action alleged in the second amended complaint on the ground that they are preempted by section 332(c)(3)(A). We therefore affirm the judgment.

Graham, [1]

We concur.

Marchiano, P. J.

Margulies, J.

A 122489, *Havens et al., v. Mobex Network Services et al.*

[1] Retired judge of the Superior Court of Marin County, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN MATEO

WARREN HAVENS, et al,
Plaintiffs,
vs. Case No. CIV 463985
MOBEX NETWORK SERVICES, et al.,
Defendants.

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REPORTER'S TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE CAROL L. MITTLESTEADT, Judge
DEPARTMENT 1

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May 12, 2008

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Annette Jaycox, RPR, CSR 13077

APPEARANCES

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SAN MATEO, CALIFORNIA - May 12, 2008
BEFORE THE HONORABLE CAROL L. MITTLESTEADT, JUDGE, DEPT. 1
THE CLERK: Calling the matter of Warren Havens,
et al versus Mobex Network, et al., case number
CIV 463985.
THE COURT: Good morning, counsel. Could I have
your appearances please starting with Mr. Richard.
MR. RICHARD: Yes. Good morning. Patrick Richard on behalf of the Plaintiffs.
THE COURT: Good morning, Mr. Richard.
MS. HARTMAN: Anne Hartman on behalf of the
defendants, Mobex Network Services and Maritime
Communications/Land Mobile.
THE COURT: Good morning, Ms. Hartman.
MR. HAHM: Good morning, Your Honor. Eugene
Hahm and Chris LeGras on behalf of Paging Systems.
THE COURT: And good morning, Mr. Hahm and
Mr. LeGras -- and LeGras is -- I can't quite make out the
spelling. L-E-G --
MR. LEGRAS: L-E-G-R-A-S. Yes.
THE COURT: Thank you, Mr. LeGras.
And, Mr. Patrick, I presume you would like to be

heard first on the tentative ruling on the motion to
strike and demurrers.
MR. RICHARD: Yes, Your Honor.
On the motion to strike I see that Your Honor



did deny that motion. We had addressed those same points
in our demurrer papers; that is, the elements of the
various causes of action, and so I think that's worth
noting for the record. Although, we didn't have a
separate piece of paper that said opposition motion to
strike.
I went back and looked at our arguments, and we
addressed those points in the demurrer. That's not the
basis of Your Honor's sustaining of the demurrer without
leave to amend.
The tentative is rather clear, and I just have
four points I would make as to why the tentative is
erroneous.
And it really requires in this circumstance that
plaintiffs who have been harmed by anticompetitive

conduct, in addition to alleging, defendants admitted
before the FCC that they had not met requirements to
maintain certain licenses and that those licenses were
thereafter returned and cancelled and the effect of that
-- the operative complaint actually alleges that the
effect of that defendant's admission in that proceeding
rendered their prior representations false; that they had
previously represented among other things that they had
met those requirements. To require in this case that
plaintiffs who have been aggrieved and harmed by again
conduct set forth in this complaint that they also allege



wrongful, that the FCC had made the determination of
wrongful conduct would essentially require plaintiffs to
meet the requirements of collateral estoppel or res
judicata.
So the first point is the tentative ruling is
based on an overly restrictive view of federal preemption

under 332. It completely ignores not only the FCC's own pronouncement in Wireless Consumers ruling discussed at length in the Moricomi decision which we cited to this Court and which defendants have ignored, and so point one it's overly restrictive view of preemption. My other point, and I'm going to circle back to that in a minute. I appreciate Your Honor's patience in this regard. The tentative ruling ignores there's preemption of antitrust claims as set forth in our opposition citing 601 of the 1996 Act as well as general savings clause regarding state law claims. Third point, the tentative ruling completely ignores allegations of state law violations in those states where the defendants are operating stations and where they've failed to pay fees and taxes and other requirements imposed under state law. And in that regard, the Connecticut Mobilecom decision that we cite in our papers, for example, we discuss it at page 6 in the opposition to Paging System Inc.'s demurrer, the District Court in New York in

addressing an issue of preemption under the state law
claim under the Connecticut Unfair Trade Practices, also
called CUTPA, if plaintiffs' CUTPA claims were based only
on issues pertaining to Verizon Wireless rates, the
complaint would lie within primary jurisdiction.
"However, as earlier discussed, plaintiffs also based their CUTPA claim on allegations other than rate
setting."
The Court's tentative ruling completely ignores
the allegations of state law violations also constituting
anticompetitive conduct and, therefore, sweeps too
broadly.
Point four, the tentative ruling also ignores
the allegations of interference with contracts, such as
the Kurian contract and other contracts unrelated to
retaining cancelled licenses and unrelated to the alleged
violations of the Federal Communications Act.
But, again, as I said, the fundamental problem

is that the -- and, you know, obviously, I was at the
Court's -- we were here last time, and I appreciate that
the Court is picking up on the word "wrongfully retained"
and not impose a requirement plaintiffs' allege in
addition to wrongful conduct an actual finding that this
Court can rely on beyond the defendant's own admission,
and we did not allege wrongful.
We did allege plaintiffs made admission as to



their previous false reporting, but if the standard --
that's really what we're discussing -- if the Court's
standard is that plaintiffs in this situation in order to
avoid preemption must allege that the FCC has already
determined an issue then that is -- goes well beyond what
the FCC says of preemption.
Claims based on damages are not a direct attack
on a decision made by the FCC, unlike the TPS decision
where the actual complaint was the participation in the
auction itself.

The allegations here concern the effect of admitted violations of rules and admitted retention of licenses and licenses which were cancelled. So, yes, I don't have a piece of paper where the FCC said in addition to losing the licenses we, in addition, determined that it's wrongful. That wasn't required as part of the audit. It should be required as part of these proceedings, but I read the ruling, and I'm happy to discuss those points.

THE COURT: All right. Before I turn to defense counsel, let me first of all indicate that you said, I'm now requiring.

I asked Annette to give me a copy of the transcript which apparently one of you asked her to prepare for the last hearing, and I'm looking at page 7, and I don't think I'm requiring anything now that I didn't

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require then.

On page 7 starting at line 5, I see this as being I'm second-guessing whether or not TPS -- I think this is a misprint -- Utilicom those licenses

automatically terminate and whether or not the defendant's wrongfully retained cancelled licenses. I think the FCC has to make that decision first, and then if they decide that, yes, those licenses automatically terminated and the defendants thus wrongfully held on to them then I get to look at the state claims based upon that. So it was always a double prong automatic termination and wrongful retention, and it's the wrongful retention that satisfies the exception that was noted by the TPS case. Automatic termination in and of itself doesn't get us there, and I tried to make that clear at the last hearing.

The violations of state law, Mr. Richard, I looked and I read a couple times your second amended complaint. Those are new allegations that were added, and I could not connect those allegations to the thrust of the wrong being alleged here. They, quite frankly, appeared to me to just be allegations thrown in to try to get around the defect that I pointed out at the last hearing.

But it's clear to me in reading the second

amended complaint, as it was from reading the first amended complaint, that the thrust and the gist of this



action is alleged state law claims based upon licenses that automatically terminated and were wrongfully retained so as to warehouse licenses and hoard spectrum. That's what this case is still about.

So I didn't ignore the violations of state law. I just couldn't see from reading the complaint how they were related to the gist of the wrong being alleged in this action.

MR. RICHARD: Well, now Your Honor is proposing a standard of demurrer that finds no support in California law, and that is that there is a gist or thrust standard that allows the Court to say if one allegation is not connected to your allegation of federal law the Court -- then a Court can't connect those dots on demurrer; therefore federal preemption.

The basis of this tentative ruling, Your

Honor --
THE COURT: Mr. Richard, let me interrupt you.
I'm happy to have you point out for me, if you will. I
wasn't applying a new standard to demurrer. I
respectfully disagree with that.
What I'm saying is that there were a couple paragraphs, both as to Mobex defendants and as to PSI,
that allege these non-payment of taxes, failure to file
income taxes, but there were no comparable allegations in
the rest of the complaint that tied that to the claims



being made here, is what I was trying to say.
So if you want to point me to the additional paragraphs that tie those state law violations to the
claims that are being made here, I would be happy to look
at it.
MR. RICHARD: Sure, Your Honor.
What the second amended complaint alleges, when
a competitor purporting to operate in these various
locations is not paying the same fees and costs imposed on

legitimately-operating businesses like my clients, they gain unfair anticompetitive advantage because they're operating on a lower cost basis, and that is in the second amended complaint, and I'm happy to review the hundred paragraphs. That wasn't the basis of Your Honor's tentative, but I'm confident it's in here as well as the allegations at pages 10 and 11 regarding the Kurian contract which apparently --

THE COURT: Well, let's stick with this one first.

The paragraphs that I'm referring to are paragraph 8 and paragraph 13 which appears early on in the second amended complaint under the title of parties, so if you could please show me under the causes of action or under the other allegations, the general allegations, for example, where those failures to pay taxes and file tax returns, et cetera relate to the claims that are being



made here.

MR. RICHARD: All right. In the first cause of action on Cartwright Act paragraph 51, subparagraph B, paragraph 51 begins, defendants have violated California antitrust laws by committing wrongful acts, including but not limited to, paragraph B says, "failing to pay fees, taxes, and other costs imposed and required under state law in each state where defendants purport to own and operate CMRS licenses, which violations unfairly reduce defendants' cost of doing business in violation of public policy.

Those claims as in the Mobilecom case that we cite and discussed in our opposition papers, Connecticut Mobilecom, are absolutely not subject to the type of sweeping preemption even under the overly restrictive interpretation urged by defendants of total preemption. Those things are not preempted.

So if the question is, how do those allegations of anticompetitive conduct tie into participating and losing licenses by violating aspects of federal law?

It's, they're not directly related. It's a separate basis for anticompetitive conduct.

THE COURT: All right. You have answered my question as to the first cause of action. Can you do the similar as to the other causes of action?

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And while you're doing that, I must explain that maybe I misread all the papers, but both last time and this time, it appeared to me that everybody seemed to agree that there was either preemption or there wasn't, so I -- you know, what we're doing right now is something that wasn't really the focus of the papers that I reviewed.

MR. RICHARD: Well, that's a suggestion -- I mean, obviously one side or the other is going to appeal these rulings, and I don't want anything on this record to suggest that my client or I have waived the arguments we expressly made in our papers or the allegations.

THE COURT: You would never be deemed to deemed to have waived the --
MR. RICHARD: I see the Court of Appeal rely on waiver in situations where the parties --
THE COURT: -- at least I will not have deemed you to have waived them.
MR. RICHARD: As I read each cause of action incorporated prior factual allegations.
THE COURT: Let me back you up then to paragraph 51B since you have brought my attention to that paragraph, and I did read it before, but I appreciate you pointing it out to me. Let me just ask you a question because I'm troubled by this. If that's the only paragraph that links



paragraphs 8 and 13 then I'm still troubled because let me ask a question. Is it your position that any time you've got businesses in competition with one another that when one business fails to pay their taxes and fails to file their income tax returns that they're guilty of violating

antitrust law?
MR. RICHARD: I don't know about any case, Your Honor. I know that in this case when there was a pattern of operating sham entities, and that as a result of them being sham entities they were violating state law that within this context it's part of -- it constitutes anticompetitive conduct.
So, again, I don't think I'm required to go beyond the allegations in this case.
THE COURT: Well, but you are required to state facts that constitute a cause of action, and that's why I'm asking you. I don't recall, and, again, if it's in your papers then just direct me to it, but where is the case law or the legal authority that says that under any circumstances mere failure to pay taxes and file income tax returns violates or constitute violations of antitrust law?
MR. RICHARD: So now we're on an issue that is --
THE COURT: Well, no. We're on the same issue

because the ground upon which this ruling is sustained is failure to state a cause of action, so I can't just look at what the complaint alleges. I have to put those allegations in context of what the law is to see if a claim has been stated.

MR. RICHARD: Well, again, as I read the Court's tentative, it's based on preemption under the TPS Utilicom Services, Inc.

To suggest there's some other defects, I think there's a notice problem. We have a ruling. I understand the Court's concern about not stepping on the FCC's toes, and that's, as in the Mobilecom case, when those claims are joined with other wrongdoing apart from, again, the view of preemption, that would require a party to allege in addition to automatic termination a prior determination by the FCC of wrongfulness. Goes well beyond any notion of preemption under the actual statutes that we're talking about.

But I'm operating on the Court's tentative

ruling responding to defendants' assertion that there's
sweeping preemption here, and now we're involved in
another discussion, and I'll endeavor to answer those
questions.
I do think that in this case the allegations
that defendants engaged in anticompetitive conduct by
failing to pay taxes, fees, and otherwise operate as bona

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fide companies, it meets the elements of anticompetitive
conduct.
I haven't researched whether the failure to pay
taxes standing on its own which is not what we alleged
would constitute an independent violation of the
Cartwright Act. I don't think that's an issue fairly
raised in the papers or in the pleadings, so I'm not sure
what to do with that. If we're --
THE COURT: Well, it brings me back to my
starting point which is in my tentative ruling which is as
I think in ruling on a demurrer, I'm supposed to read the

entirety of the pleading, and I'm supposed to read an allegation in one part in connection with allegations in the other part. And as I read the second amended complaint, it appears to me that we still have a case that is founded upon licenses which allegedly automatically terminated and allegedly were wrongfully retained by the defendants. That's what I read when I read the entirety of the second amended complaint.

Now, if I'm reading the entirety of the second amended complaint correctly, I have no business determining that FCC licenses were wrongfully retained. It would be -- that lies within the jurisdiction of the FCC, number one; and, number two, as I pointed out in the tentative, it appears that the FCC has heard these arguments, and has thus far found that there's

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insufficient evidence to support those claims, so --

MR. RICHARD: Well, that's a separate issue, Your Honor, and that is on the issue of cancellation of

licenses and the basis for that cancellation, namely, defendant's admission that their representations of construction and other requirements necessary to operate were incorrect, and the licenses were cancelled. The fact that plaintiffs then in other proceedings said, look, if they didn't have those licenses that meant that they didn't have complete coverage in these other areas, and that led into not subsequent proceedings but in the actual, and so the issue of what was the impact of those cancelled licenses is the subject of ongoing proceedings before the FCC, and those will be resolved in one fashion or the other, but that in no way will ever alter the fact that there was a period of time where defendants had licenses, made representations of construction and other requirements under the FCA which were false. That's undisputed. That doesn't require the Court to revisit, re-evaluate, or ever reach a contrary decision.

THE COURT: But it appeared to me that the FCC has also heard arguments about these misrepresentations and hasn't found sufficient evidence to support those either.

MR. RICHARD: I think that's reading way too

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much into those subsequent proceedings involving the purpose for which under the FCA if a licensee is deemed to have character issues or being unfit or a long list of other things that can have an impact on their participation in subsequent auctions; their fitness to maintain licenses in other contexts. I just think that's reading way too much into the FCC's determinations. I would note that in the Wireless Consumers Alliance decision which was cited in Moriconi which we set out in our papers, the FCC actually said, "We specifically determined that a damage award or calculation is not necessarily a ruling on reasonableness of the price charged."

We're getting pretty far afield from the notion that plaintiffs in this case are not asking for injunctive relief or not asking this Court to re-evaluate an actual decision made regarding the cancelled licenses. And in the portion of the ruling from the last oral proceedings we had here where Your Honor read that you needed allegations that certain licenses had been automatically terminated, and thus -- and I think you said were wrongfully held or improperly held, so it's the allegation of wrongful termination from which a State Court Judge from allegation of automatic termination in the context of the representations that allowed defendants to have licenses for certain period of time allegation.

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Well, those were deemed automatically terminated. Defendants admit that thus the inference, the conclusion from that is apparent from those allegations. To add on to that, well, I need a determination from the FCC that it was wrongful, I appreciate that

that's your Court's reading of what would be required to avoid this Court having to make any interpretation of those events, and I'm not going to keep going around and around on that. We have a fundamental difference of opinion as sometimes happens as to what the law does or doesn't require.

I must say that our impression after the last hearing was we discussed there were certain licenses that had been automatically terminated and cancelled and certain licenses hadn't, but I didn't mean to suggest that Your Honor in the actual report or ruling at the last hearing, I think it's just a question of emphasis as to is the wrongfulness to be presumed from the licenses for which are no ongoing proceedings, or is it wrongfulness something the FCC itself had to determine. And there is no piece of paper that I'm aware of in connection with the audit where defendants made the admission that they made that would have permitted or required the FCC in those proceedings to take an

additional step and say thank you very much for admitting
that your licenses have been not been maintained and that

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you haven't met the law and that they are therefore lost.
We must also therefore make a finding of wrongfulness.
That's just not the way that proceedings occurred.
THE COURT: No, but, see, there's information
that is required in between those two steps, and that's
the problem I'm having.
MR. RICHARD: Um-hum.
THE COURT: Let's back up just a step.
The Wireless case that you keep citing is
distinguishable, and I think from the case that we have
here because Wireless really doesn't bear on the question
of entry into the market, and entry into the market here
is broad enough in my opinion to include not only the
initial obtaining of licenses but the maintenance of those
licenses, and that the Wireless case merely confirmed that
Section 332 does not preempt per se damage awards in State

Court.
The problem here is that the damage award that
you want to get in this State Court is predicated upon a
finding of wrongful retention of licenses, and in my
opinion the FCC has to determine that, and it's not as
simple as saying that the licenses automatically
terminated. There's additional information there before
you get to that wrongful conclusion, and for me, a State
Court, to make that determination, in my opinion, is
stepping on the toes of the FCC.

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MR. RICHARD: And appreciate that, Your Honor.
I don't think there's anything I could say. I can quote
from additional cases and whatnot, but I think I have Your
Honor's view in hand.
Our reading of the cases suggest that that's not
the law, and that that's simply too -- it's an overly -- I
hesitate to use an adjective -- aggressive view of what

this Court can and cannot do in these circumstances,
especially when we're talking antitrust claims. The
purpose of having these fair rules is served both by the
FCC ensuring its processes are fair, but it's also served
by allowing participants resort to antitrust laws where
they're not observed.
THE COURT: All right. Thank you, Mr. Richard.
Let me turn to your opposing counsel.
And I don't really care who would like to be
heard first, so whoever would like to go first.
MR. HAHM: Your Honor, this is Mr. Hahm. I'll
be very brief.
We obviously submit to the tentative ruling and
sustaining of the demurrers, both ours and Mobex demurrers
as well.
It is certainly correct, and I think Mr. Richard
has acknowledged that there's nothing in any FCC record
that shows the FCC makes a finding that PSI or any of the
other defendants engage in any sort of wrongful conduct

with respect to the cancelled licenses as they've been alleged in the second amended complaint. There's never been any fines imposed, no penalties, no sanctions. No licenses have been terminated. We were never forbidden from participating in any auction, no finding of conspiracy, no finding of any collusion, and this is true with respect to the licenses that are soon to be challenged before the FCC as well as the licenses that they nominated as having been cancelled. They say there's been an admission as if there's been admission of guilt. This was a housekeeping audit. The FCC conducted it prior to a geographic auction. We provided information that particular stations may not have been constructed. The licenses were deleted. There was certainly no finding of wrongfulness. The plaintiffs continued to allege before the FCC this per se violation of Federal Communications Act which it is not and we're not fit to do business before the FCC and maintain licenses. We disagree with that, and thus far the FCC has as well.

So we agree that there certainly hasn't been a predicate finding of wrongfulness that the Court has determined under FCA statute or accompanying regulations.

THE COURT: What about his argument that antitrust claims are specifically exempted from the FCA?

What about that, Mr. Hahm?

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MR. HAHM: I'm probably going to defer that to Ms. Hartman. She drafted the argument on that specifically.

The only allegations I see are in the first cause of action under Cartwright Act. This is a 120-paragraph complaint. In one subsection of the allegation there's reference to failure to pay state law taxes or registrations. I would defer to Ms. Hartman on that.

THE COURT: All right. Ms. Hartman, please.

MS. HARTMAN: Yes, Your Honor. With respect to the antitrust cause of action, I think the Court has identified correctly that that cause of action is still

based on predicate wrongful acts allegedly taken before the FCC.

And as with any other cause of action, if you read through, the way the first cause of action here is alleged it would require the Court to make a finding -- for example, subparagraph 51A, that defendants have violated California's antitrust laws by hoarding and warehousing licenses when defendants knew or should have known that they could not comply with their duty to construct those. That's the wrongful act they identify in support of antitrust cause of action. That specifically requires -- this would specifically require this Court to



second-guess decisions made by the FCC.

And just to follow up on something Mr. Hahm raised that they haven't made a wrongful finding, as you can see from the papers that were submitted by the parties, plaintiffs have worked vigorously to get a finding from the FCC that there was some wrongful conduct

on the part of Mobex and on the part of MCLM and Paging Systems, and the FCC under its procedures that it has to police its own process has not made any such finding.

I think with respect to the tax issue, you know, if we are here to litigate whether my client has paid its taxes, that's news to me.

In a way, you know, I think the Court has identified the problem on that one well with respect to is it whether failing to pay taxes is anticompetitive conduct that is much more than would be required if that were even possible, but it's not drafted by the complaint. The complaint is drafted as hoarding and warehousing of the licenses.

THE COURT: All right. Mr. Hahm, did you have anything else you wanted to add?

MR. HAHM: I would agree, obviously, with Ms. Hartman's comments, Your Honor. This case has been and this case always has been about terminated and retained licenses. Paragraph 28 of the second amended complaint they refer to defendant's

licenses upon which this action was based falling in two general categories, challenged licenses warehousing and hoarding spectrum. That was the basis for resisting the original motion to strike under the SLAPP statute, and what we're talking about are the validity of licenses or determinations about FCC licenses, and we agree with the Court's tentative obviously that there has been no finding, no requisite finding of wrongfulness. The alternative I think the Court raised, this is -- if you had a situation where a license cancelled automatically in the absence of any finding, plaintiffs' argument that is automatically actionable in State Court. I don't think that's the intent of the FCA and its relations because that could be inconsistent with the finding of the FCC. The FCC may say this license that you're challenging actually did terminate a few years ago, but we don't think there's anything wrong. The licenses will be

deleted, but there was no conspiracy or abuse of process
or anything like that.
Plaintiffs want to be able to say as soon as that happens de facto I can march into State Court and sue
you for conversion, for example.
Specific causes of action in the second amended
complaint are all based -- appear to be based, perhaps
with exception of the first, on alleged violations of FCC

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rules.
I think if the Court took a look at the conversion cause of action or negligent representation
causes of action, those are all based on things that were
allegedly said or not said to the FCC.
I can answer any other questions that the Court
has, but obviously we submit to the tentative.
THE COURT: All right.
Ms. Hartman, did you have any further points you
wish to be heard on?
MS. HARTMAN: Not unless you have any additional
questions.
THE COURT: And, Mr. LeGras, do you wish to be

heard?
MR. LEGRAS: No.
THE COURT: Mr. Patrick, your reply, please.
MR. RICHARD: Well, I can see where we're headed. I would simply observe what we attempt to make clear in our papers which is Congress has said in several different ways that there is no preemption of existing common law claims, statutory claims, every congressional intent as limited preemption. We cited cases from around the country rejecting the argument. We continue to hear oh, you can't step on the toes of the FCC. The fact is, the FCC isn't equipped to deal with antitrust. Congress knew that. FCC knows it. The Courts know it. The FCC



isn't equipped to make determinations necessary for damages and so -- but that's all set out in the papers.
So I think rather than chase our tail on this, I'm content to respond to any specific questions Your Honor has, but this is -- it is purely a question of law

and matching up the allegations in the second amended complaint to statutory language, congressional intent, and District Court cases from around the country.

THE COURT: All right. Matter fully submitted?

MS. HARTMAN: Submit on that basis, Your Honor.

THE COURT: Submitted, Mr. Patrick?

MR. RICHARD: For the record, it's Mr. Richard.

THE COURT: I'm sorry, Mr. Richard. I apologize. I've been calling you by the right name up until now. I apologize, Mr. Richard. Submitted? Let's take a brief recess, and let's return at 11 o'clock.

(Recess.)

THE COURT: All right. Apologize for the slight delay, but I wanted to pull up and take a look at the Verizon Communications versus Trinko, T-R-I-N-K-O, case that, Mr. Patrick, you cite in your opposition papers, and I have a few additional questions for you based upon taking another look at that case. First of all, Verizon, I don't believe, is a preemption case.

Secondly, looking at the page cite that you had given us, namely, page 406, Verizon references a savings clause that you did not reference in your opposition, but, nevertheless, I took a look at it here. It's section 601 -- second here, let me find that page again. It's Section 601(b)(1) of the 1996 Act, and that is an antitrust specific saving clause providing that nothing in this act or the amendments made by this act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws. Verizon was dealing with implied immunity, not preemption, and it appears to me that this savings clause is comparable to the savings clause that you did bring to my attention for state law claims, but we still have the same problem. This doesn't mean that if the underlying wrong is something that the FCC should be determining that just because it's included in an antitrust claim that preemption doesn't apply. So I wanted to give you an opportunity to respond to that.

MR. RICHARD: Sure, Your Honor. I thought we did cite 601(b)(1) at page four of our opposition on the PSI.

THE COURT: Okay. If you did, I stand corrected.

MR. RICHARD: And we, in fact, quote the section Your Honor just read.



The point of having an antitrust specific savings clause is that if antitrust claims are not preempted then concerns about stepping on the FCC's toes or exclusive jurisdiction of the FCC don't come into play.

THE COURT: But this doesn't say that they're not preempted. This is a savings clause, just like the state law savings clause, that makes it clear that those other claims are out there.

But my concern is that I can't reach the state law claims in this case because the predicate for those state law claims, the predicate for the antitrust claim, are facts alleged that in my opinion are matters that the

FCC should be determining. They regard entry. They regard maintenance of licenses, entry into the market, and maintenance of licenses, and the FCC needs to make that predicate determination before I could then proceed with the state law claims and the antitrust claim.

MR. RICHARD: And just real briefly, I appreciate Your Honor's question. There are two issues. One is, what does it mean that say under 601 nothing in the Telecommunications Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws, and reading that in conjunction with the other savings clauses that we've been talking about, if the Federal Communications Act is not intended to be interpreted or read to impair or modify the



antitrust claims, it has been -- it is a savings clause. It means what it says there, what Your Honor just read. So if the FCA cannot impair, modify, or supersede antitrust laws, I don't think that means that a

Court, a Judge, can say, well, until the FCC makes a predicate determination necessary for me to make a finding of antitrust, I'm hands off. That's one point. I think that's just, again, an incorrect ruling of what is intended by the Telecommunications Act and what Congress intended with all these provisions to work together.

Separate and apart from that, what we do have undisputed, undeniable is a determination, a finding, by the FCC that certain licenses automatically terminated.

You would not expect under the rules of the FCA regarding automatic termination that the FCC would need to make some further finding or determinations of wrongfulness.

The fact is, for a period of years defendants acted as though they had valid licenses knowing that they hadn't met requirements. Then they admit those licenses are lost.

Any Judge or jury would looking at that chronology, those facts, that loss and determination by the FCC, could conclude that that is the basis for state

law tort claims or antitrust claims without the additional
determination which would never be forthcoming under the
automatic terminations provisions of a finding of

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wrongfulness. The wrongfulness is apparent from looking
at the course of conduct as alleged in the complaint that
those prior representations made over a period of years
must have been false. That's not fair to the petitioners,
a license monopoly.
The flip side of monopoly that's wrongfully
maintained became apparent and admitted upon cancellation.
The flip side of a wrongful license is an antitrust
violation, so I think -- I do think that those issues need
to be seen together, and that congressional intent under
all these provisions including 601(b)(1) which we did cite
is that the antitrust claim is not impaired by the FCA,
and that these arguments of exclusive jurisdiction, they
use the word exclusive repeatedly are wrong, but I'm not

sure where that leaves us, Your Honor.
THE COURT: Well, I appreciate your additional
comments, Mr. Richard.
MR. RICHARD: Thank you.
THE COURT: Ms. Hartman.
MS. HARTMAN: Yes, Your Honor. Thank you.
The point I would make about Section 601 is that
to say that the Federal Communications Act does not
modify, impair, or waive antitrust law is not to say that
it permits them wholesale. That is certainly not the
case.
And that section 601 must be read in conjunction



with section 332(c)(3)(a) which is that -- which talks
about regulation of entry into the market.
So take that, and we admit that we had valid
licenses or that we acted as if we had valid licenses and
then admitted that they were -- that they should be
cancelled is not the same as a predicate finding of a
wrongful act at all.
And, again, despite plaintiffs' efforts to find

that, not only that, it's certainly not an admission of conspiracy of anyone else to engage in some license warehousing scheme which of course is what would be required under the Cartwright Act.

THE COURT: And, Mr. Hahm, did you wish to add anything?

MR. HAHM: The only thing I was going to add, Your Honor, with respect to the Trinko records is I believe that the Court reversed the Second Circuit --

THE COURT: Yes.

MR. HAHM: -- and came to the conclusion that antitrust exemption doesn't apply -- just reading from the case -- allegations of violations of duties are difficult for antitrust courts to evaluate, not only because they are highly technical, but also because they're likely to be extremely numerous, given the incessant complex and constantly changing interaction of competitive and incumbent LECs, and it goes on.

I would agree with Ms. Hartman. This is a situation where that particular provision doesn't apply.
I'll leave it at that, Your Honor, unless you have any questions.
THE COURT: All right. Interesting issues, and
certainly you can tell that I've struggled with them along
the way, but I remain unpersuaded that this particular
case is not preempted by the FCA.
Or to say that in a positive statement form, I remain convinced that the underlying wrongful conduct here
is something that the FCC should be determining in first
instance; and, until they do, my reading of the TPS case
is that I can't go forward with the state law claims
including the antitrust claims alleged under the
Cartwright Act, so I'm going to adopt my tentative ruling,
and it will become the order of the Court.
And we'll see what the First District believes on this issue, and I'll learn from whatever they rule on
this particular issue.
We did have a Case Management Conference also
scheduled for today, and in light of the ruling I just

made on the demurrers, the case will ultimately be
dismissed, so we don't need to hold a Case Management
Conference Number 3.
And, also, I'm going to go ahead and vacate the
July 28th hearing on the motion for stay of proceedings.

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Since the case is on the path to be dismissed, that motion
also becomes moot.
Thank you very much, counsel. Appreciate your
arguments and hard work on this matter and best wishes to
all of you.
MR. RICHARD: You too, Your Honor.
MR. HAHM: Paging Systems will prepare the order.
THE COURT: Yes, and Mobex defendants should
also prepare an order, or if you want to do a joint order,
it doesn't matter.
MR. HAHM: Sure. Thank you.
MR. RICHARD: Thank you, Your Honor
THE COURT: Thank you.

(The proceedings adjourn.)

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IN THE SUPERIOR COURT OF THE STATE OF
CALIFORNIA

IN AND FOR THE COUNTY OF SAN MATEO

WARREN C. HAVENS, et al., No. CIV 463985

Plaintiffs, ASSIGNED FOR ALL PURPOSES TO: HON.

| | |
|---|---|
| v. | CAROL L. MITTLESTEADT |
| MOBEX NETWORK SERVICES, LLC, et al. | ORDER AFTER HEARING ON DEMURRERS TO THE |
| Defendants. | FIRST AMENDED COMPLAINT FILED BY ALL DEFENDANTS; CASE MANAGEMENT ORDER |
| | Date: February 11, 2008<br>Time: 10:00 a.m.<br>Dept.: 1<br>Date of Filing: June 22, 2007 |

The demurrers of Defendants Maritime Communications/Land Mobile, LLC, Mobex Network Services, LLC, and Paging Systems, Inc. to the First Amended Complaint of Plaintiff Warren C. Havens, Telesaurus VPC, LLC, AMTS Consortium, LLC, Intelligent Transportation & Monitoring Wireless LLC and Telesaurus Holdings GB LLC came on regularly for hearing by the Court on February 11, 2008, at 10:00 a.m. Adam R. Bernstein and Patrick Richard appeared as counsel for Plaintiffs; Anne Hayes Hartman and Keith E. Johnson appeared as counsel for Defendants Maritime Communications/Land Mobile, LLC and Mobex Network Services; and Eugene L. Hahm appeared as counsel for Defendant Paging Systems, Inc. After

hearing, the matter was submitted to the court for a ruling. The court, having read and considered the supporting and opposing points and authorities and having heard and considered the arguments of counsel, and good cause appearing therefore,

IT IS HEREBY ORDERED:

1. DEMURRER TO THE FIRST AMENDED COMPLAINT FILED BY DEFENDANTS MARITIME COMMUNICATIONS/LAND MOBILE, LLC AND MOBEX NETWORK SERVICES, LLC:

(a) The joinder of Defendant Paging Systems Inc. in this demurrer filed by Defendants Maritime Communications/Land Mobile LLC and Mobex Network Services, LLC (collectively "Mobex Defendants") is hereby granted.

(b) Plaintiffs' objections to Mobex Defendants' request for judicial notice is overruled.

(c) Mobex Defendants' request for judicial notice is granted as to Exhibits A through M (the existence, but not the truth of the factual contents thereof) pursuant to Evidence Code Section 452(c), 452(d) and 453.

(d) Mobex Defendants' general demurrer to the first amended complaint (FAC) and each of its seven separate causes of action is hereby sustained with twenty days leave to amend. Plaintiffs have failed to state facts sufficient to constitute a cause of action in that the claims set forth in the FAC come within the express

preemption clause of the Federal Communications Act at 47 U.S.C. §332(c)(3)(A). Adjudication of the state claims pled in the FAC would require the Court to determine whether or not Defendants' site-based licenses remained valid or were terminated and thus necessarily implicate the regulation of "entry" into the mobile service market. See *TPS Utilicom Services, Inc. v. AT&T Corp.* (C.D. Cal. 2002) 223 Fed.Supp.2d 1089, 1108 (*TPS*). Leave to amend is granted to allege facts sufficient to show that the Federal Communications Commission has finally determined that Mobex Defendants wrongfully retained canceled licenses. See *TPS* at page 1109 fn 19 ("If TPS brought the unfair practices and tortious interference claims – properly alleged – *after* a determination that a party had wrongfully participated in an FCC licenses auction, such claims might escape FCA preemption. That is not the case before the Court.").

2. DEMURRER TO THE FIRST AMENDED COMPLAINT FILED BY DEFENDANT PAGING SYSTEMS, INC.:

(a) The joinder of the Mobex Defendants in this demurrer filed by Defendant Paging Systems, Inc. ("PSI") is hereby granted.

(b) Plaintiffs' objection to Exhibit A of PSI's request for judicial notice is sustained. Plaintiffs' objections to Exhibits B, C, and D of PSI's request for judicial notice are overruled.

(c) PST's request for judicial notice is granted as to Exhibits B, C, and D (the existence,

but not the truth of the factual contents thereof) pursuant to Evidence Code Sections 452(c), and 453. PSI's request for judicial notice as to Exhibit A is denied.

(d) Plaintiffs' unopposed request for judicial notice is granted as to Exhibits A through E (the existence, but not the truth of the factual contents thereof) pursuant to Evidence Code Sections 452(c) and 453.

(e) PSI's general demurrer to the first amended complaint (FAC) and each of its seven separate causes of action is hereby sustained with twenty days leave to amend. Plaintiffs have failed to state facts sufficient to constitute a cause of action in that the claims set forth in the FAC come within the express preemption clause of the Federal Communications Act at 47 U.S.C. §332(c)(3)(A). Adjudication of the state claims pled in the FAC would require the Court to determine whether or not Defendants' site-based licenses remained valid or were terminated and thus necessarily implicate the regulation of "entry" into the mobile service market. See *TPS Utilicom Services, Inc. v. AT&T Carp.* (C.D. Cal. 2002) 223 Fed.Supp.2d 1089, 1108 *(TPS)*. Leave to amend is granted to allege facts sufficient to show that the Federal Communications Commission has finally determined that PSI wrongfully retained canceled licenses. See *TPS* at page 1109 fn 19 ("If TPS brought the unfair practices and tortious interference claims — properly alleged — *after* a determination that a party had wrongfully participated in an FCC licenses auction, such claims

might escape FCA preemption. That is not the case before the Court.").

3. CASE MANAGEMENT ORDER:

(a) Discovery in the action shall remain stayed until such time as the case is at issue.

(b) The parties shall meet and confer prior to the next Case Management Conference as to a stipulated protective order.

(c) The parties shall meet and confer prior to the next Case Management Conference as to what type of alternative dispute resolution may be appropriate, and when ADR might be beneficial.

(d) May 12, 2008, at 1.0:00 a.m., is reserved for hearing in this matter. Defendants may notice hearing on any further demurrer or response to any Second Amended Complaint for that date and time, subject to applicable notice deadlines. A further Case Management Conference will be held immediately following any such law and motion proceeding on that date, or, if there is no law and motion proceeding on that date, will commence at 10:00 a.m. The parties are to file and serve further Case Management Conference Statements at least five court days prior to this date in accordance with the Complex Court Rules and Procedures.

Dated. February 25, 2008

/s/CAROL MITTLESTEADT

CAROL L. MITTLESTEADT
JUDGE OF THE SUPERIOR COURT

Approved as to form:

Patrick Richard, Attorney for Plaintiffs

/s/Eugene L. Hahm
Eugene L. Hahm, Attorney for Defendant Paging Systems, Inc.

Approved as to form:

/s/Patrick Richard
Patrick Richard, Attorney for Plaintiffs

Eugene L. Hahm, Attorney for Defendant Paging Systems, Inc.

Court of Appeal, First Appellate District, Division One - No. A122489

S177665

IN THE SUPREME COURT OF CALIFORNIA

**En Banc**

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WARREN C. HAVENS et al., Plaintiffs and Appellants,

v.

MOBEX NETWORK SERVICES, LLC et al., Defendants and Respondents.

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The application for stay and petition for review are denied.

SUPREME COURT
FILED
JAN 13 2010
Frederick K. Ohlrich Clerk
Deputy

**GEORGE**

*Chief Justice*

MANATT, PHELPS PHILLIPS, LLP
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Attorneys for Defendant
Paging Systems, Inc.

SUPERIOR COURT FOR THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN MATEO
UNLIMITED JURISDICTION

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| WARREN C. HAVENS, an individual, TELESAURUS VPC, LLC, a Delaware Limited Liability Company, AMTS CONSORTIUM, LLC, a Delaware Limited Liability Company, INTELLIGENT TRANSPORTATION & MONITORING WIRELESS LLC, a Delaware Limited Liability Company, and HOLDINGS GB LLC, a Delaware Limited Liability Company, | Case No. CIV-463985<br><br>**PAGING SYSTEMS INC.'S REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF DEMURRER**<br><br>[Filed Concurrently |

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| *Plaintiffs,*<br>v.<br><br>MOBEX NETWORK SERVICES, LLC, a Delaware Limited Liability Company, MARITIME COMMUNICATIONS/LAND MOBILE, LLC., a Delaware Limited Liability Company, PAGING SYSTEM,S INC., a California corporation, and DOES 1-100<br>*Defendants* | with Demurrer to Second Amended Complaint]<br><br>Date: May 12, 2008<br>Time: 10:00 a.m.<br>Dept.: 1<br>Judge: The Hon. Carol Mittlesteadt<br><br>Complaint Filed: June 21, 2007<br>Trial Date: N/A |

**TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

Defendant Paging Systems, Inc. ("Paging Systems"), hereby respectfully asks the Court to take judicial notice, pursuant to California Evidence Code Sections 452 and 453. of the following documents filed in this action in support of its Demurrer to Plaintiffs' Second Amended Complaint:

**Exhibit A:** Federal Communications Commission Order DA 06-1582l; *In the Matter of MARITIME COMMUNICATIONS/LAND MOBILE, LLC & PAGING SYSTEMS, INC., Petitions To Deny filed by* Warren C. *Havens, AMTS*

*Consortium, Telesaurus-VPC, LLC and Telesaurus Holdings GB LLC.* Released on August 3, 2006:

**Exhibit B:** Federal Communications Commission Order on Reconsideration DA 07-1087; *In the Matter of* MARITIME COMMUNICATIONS/*LAND MOBILE, LLC & PAGING SYSTEMS, INC., Petitions to Deny filed by Warren C. Havens, AMTS Consortium, Telesaurus-VPC, LLC and Telesaurus Holdings GB LLC,* Released on March 8, 2007;

**Exhibit C:** Application for Review; *In the Matter of Paging Systems, Inc.'s Form 601 Application for Auction No. 61*: Application for *Renewal of AMTS Stations in Hawaii,* filed by Warren C. Havens, AMTS Consortium, Telesaurus- VPC, LLC and Telesaurus Holdings GB LLC, April 9, 2007;

**Exhibit D:** Federal Communications Commission Order DA 05-1119; *In the Matter* of *PAGING SYSTEMS, INC. Petition to Deny filed by Warren C. Havens, AMTS Consortium, Telesaurus-VPC, LLC and Telesaurus Holdings GB LLC,* Released on April 22, 2005;

**Exhibit E:** Federal Communications

Commission Order on Reconsideration DA 06-1078; *In the Matter Of PAGING SYSTEMS, INC. Petition 10 Deny. filed by Warren C. Havens, AMTS Consortium, Telesaurus –VPC, LLC and Telesaurus Holdings GB LLC,* Released on May 24. 2006;

**Exhibit F:** Application for Review by Warren Havens, et al., re *In the Matter of Paging Systems, Inc.'s Form 601 Application for the PC-AMT005-B, Great Lakes, License from Auction No. 57,* filed by Warren C. Havens, *et al.,* June 23, 2006; and

**Exhibit G:** Petition to Deny, or in the Alternative Section 1.41 Request in *In the Matter of Paging Systems, Inc.'s Application for Renewal of Licenses,* filed April 11, 2008 by Warren C. Havens, et al.

The documents of which notice is requested are offered in support of Paging Systems' Demurrer, Section 452 of the California Evidence Code states that judicial notice shall be taken to facts "Official acts of the legislative, executive, and judicial departments of the United States and of any state of the United States." Cal. Evid. C. § 452(c). Here, the documents were either submitted to or prepared by the FCC, an executive department responsible for regulating interstate and international communications by radio, television, wire, satellite and cable in the United States.

California Courts have long held that judicial notice shall be taken concerning official documents and orders for state and federal administrative agencies, where there is no dispute as to the authenticity. *See, e.g., McAllister v. County of Monterey,* 147 Cal.App.4th 253, 267 fn. 1 (2007) (court property took notice of proceeding before the California Coastal Commission); *Rodas v. Spiegel,* 87 Cal.App.4th 513, 518 (2001) (for purposes of judicial notice, "[o]fficial acts include records, reports and ***orders of administrative agencies***.") (emphasis added); *Hoechst Celanese Corp. v. Franchise Tax Bd.,* 25 Cal.4th 508, 558 fn. 5 (2001) (court properly took judicial notice of state administrative hearings from another state).

Paging System respectfully requests that – based upon the rule and cases cited herein and the exhibits submitted herewith – this Court grant its Request for Judicial Notice.

Dated: April 14, 2008

MANATT, PHELPS & PHILLIPS, LLP.

BY: /S/
Eugene L. Hahm
Attorneys for Defendants
PAGING SYSTEMS, INC.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN MATEO –
[Filed March 18, 2008]

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CASE NO. CIV-463985

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WARREN C. HAVENS, an individual; TELESAURUS VPC, LLC, a Delaware Limited Liability Company; AMTS CONSORTIUM, LLC, a Delaware Limited Liability Company; INTELLIGENT TRANSPORTATION & MONITORING WIRELESS LLC,, a Delaware Limited Liability Company; and TELESAURUS HOLDINGS GB LLC., a Delaware Limited Liability Company,

*Plaintiffs,*

v.

MOBEX NETWORK SERVICES, LLC, a Delaware Limited Liability Company; MARITIME COMMUNICATIONS / LAND MOBILE, LLC, a Delaware Limited Liability Company, PAGING SYSTEMS, INC., a California corporation; and DOES 1-100,

*Defendants.*

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**PLAINTIFFS' SECOND AMENDED COMPLAINT**

Come now Plaintiffs Warren Havens, Telesaurus VPC LLC, AMTS Consortium LLC, Intelligent Transportation & Monitoring Wireless LLC, and Telesaurus Holdings GB LLC and aver and allege against Defendants as follows:

PARTIES

1. Plaintiff Warren C. Havens is an individual residing in the City of Berkeley, County of Alameda, State of California ("Havens"). Since 1988, Havens' principal occupation and business has been obtaining licenses, including licenses in the Automated Marine Telecommunications Service ("AMTS") frequency spectrum,[1] issued by the Federal Communications Commission ("FCC"), and developing businesses based on new wireless communications services for government entities, critical infrastructure companies, and others. Havens pursues such business principally as the founder and pre-organizational developer, majority owner, Manager, and President of the below-described Plaintiff LLCs. In past years, Havens assigned to said LLCs virtually all of the FCC licenses he obtained (with FCC approvals), and related rights and claims, all of which were subject to the unlawful actions and damages by Defendants described herein.

2. Plaintiff Telesaurus VPC, LLC is a Delaware Limited Liability Company with its principal place of business in Berkeley, California, and has been engaged since 1999 in the business of obtaining licenses, including licenses in the AMTS frequency spectrum, from the FCC, and developing businesses to provide new wireless communications services authorized by said FCC licenses to governmental and non-governmental parties within the State of California and other States.

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[1] Definitions for many of the terms used herein are set forth infra, p. 6.

3. Plaintiff AMTS Consortium LLC ("ACL") is a Delaware Limited Liability Company with its principal place of business in Berkeley, California, and has been engaged since 2004 in the business of obtaining licenses, including licenses in the AMTS spectrum, from the FCC, and developing businesses to provide to governmental and non-governmental entities certain new wireless communications services authorized by said FCC licenses within the State of California and other States.

4. Plaintiff Intelligent Transportation & Monitoring Wireless LLC is a Delaware Limited Liability Company with its principal place of business in Berkeley, California, and has been engaged since 2005 in the business of obtaining licenses, including licenses in the AMTS spectrum, from the FCC, and developing businesses to provide to governmental and non-governmental entities certain new wireless communications services authorized by said FCC licenses within the State of California and other States.

5. Plaintiff Telesaurus Holdings GB LLC is a Delaware Limited Liability Company, with its principal place of business in Berkeley, California, and has been engaged since 2001 in the business of obtaining licenses, including licenses in the Location and Monitoring Service ("LMS") spectrum and the Multiple Address System ("MAS") spectrum (together herein, the "900 MHz Licenses" and the "900 MHz Spectrum"), from the FCC, and developing businesses to provide to governmental and non-governmental entities certain new wireless communications services authorized by said FCC

licenses within the State of California and other States.

6. The Plaintiffs herein below are referred to below as "Plaintiffs," which shall mean all, anyone, or any combination of Plaintiffs, as the context provides. To date and at this time, Plaintiffs share common principal business office facilities (in Berkeley, California, as noted above), have the same controlling interest holder and Manager, and jointly pursue certain business plans and actions.

7. Defendant Mobex Network Services, LLC ("Mobex") is, on information and belief, a Delaware Limited Liability Company with its principal places of business at Alexandria, Virginia and/or Jeffersonville, Indiana. Mobex has for several years operated and continues to operate, by itself or on behalf of Defendant MCLM (defined below), numerous AMTS wireless "Stations" (each, a particular transmitter location) and "Systems" (each, the physical equipment used by a Station) under FCC AMTS licenses in California, including in San Mateo County. As a past and ongoing licensee and operator (or self-alleged operator) of AMTS "Public Coast" Stations and licenses under 47 C.F.R §20.9(a)(5), Mobex has had an obligation to operate as a "Commercial Mobile Radio Service" ("CMRS") licensee and operator within that term's meaning in the Federal Communications Act, 47 U.S.C. §151 et seq. ("FCA") and FCC rules, 47. C.F.R. ("FCC Rules"). However, on information and belief, at many, if not all of its AMTS Stations, Mobex: (i) did not and has not installed and operated the Systems required to meet the construction and operational requirements of AMTS CMRS Public Coast Stations, and did not file with the FCC the filings required of

operating CMRS companies; and (ii) did not provide "Interstate" communications, as opposed to "Intrastate" communications, as those teams are defined in the FCA and FCC Rules.

8. Separate and distinct from requirements imposed upon Mobex under Federal law, Plaintiffs are informed and believe, and thereon allege, that Mobex has failed to meet State law filing, tax, and real-estate property-access requirements for States in which Mobex purports to own and operate AMTS CMRS Stations not previously cancelled by the FCC. For example, (i) Mobex failed to register in States, including but not limited to Florida, Massachusetts, Oregon and Virginia, as an out-of-state legal entity to do business in the State, a threshold requirement by any CMRS Station operation in such states; (ii) in such states Mobex has not collected from its alleged customers and submitted in required state filings surcharges and other tax which states require of CMRS operators (and that are subject to the "State tax savings provision" in the Telecommunications Act of 1996, Public Law 104-104, §601(c)(2); (iii) in such states Mobex has not filed income tax returns; (iv) in such states Mobex has not obtained and maintained required legal access to the physical antenna structures (towers, tall buildings, etc.), equipment shelters, interconnection facilities, etc., which are required for actual construction and operation of its alleged still-valid AMTS stations; and (v) in such states Mobex has not paid other sums and made other filings and satisfied other obligations imposed under State law.

9. In or about 2000, Mobex acquired Regionet Wireless License LLC ("Regionet") and

obtained all of its AMTS licenses and associated Stations, Systems, and business and joint ventures, and on information and belief, assumed the assets and liabilities of Regionet. In or about 2000, Mobex also acquired Waterway Communications ("Watercom"), a corporation, and obtained all of its AMTS licenses and associated Stations, Systems, and business and joint ventures involving AMTS, and on information and belief, assumed the assets and liabilities of Regionet and Watercom. Some of the acts complained of herein were done by Regionet or Watercom, and liability therefore was expressly or impliedly assumed by Mobex, and/or Regionet's and Watercom's acts were ratified by Mobex after their respective acquisitions, including in various filings before the FCC. After these acquisitions, principal personnel of Regionet and Watercom were employed by Mobex and some to this day serve in Mobex. After acquisition of Regionet and Watercom, in various FCC filings, Mobex has defended and attempted to use for its benefit AMTS-license-related assets, actions, FCC filings, joint ventures, goodwill, and other associated assets of Regionet and Watercom including those described in this Complaint. As used herein below, "Mobex" includes Mobex, Regionet, and Watercom, and any entities in which Mobex or its principals have legal control, and any entities that have legal control of Mobex or its principals (herein, by a "principal" in an legal entity, we mean a person with controlling interests on a current or fully diluted basis, considering options and other rights to voting interests as if fully exercised).

10. Defendant Maritime Communications/Land Mobile, LLC ("MCLM") is, on

information and belief, a Delaware Limited Liability Company formed in year 2005, with offices in Mississippi. MCLM is engaged in business to acquire from the FCC AMTS Geographic Licenses across the United States, and to this end was the high bidder in the FCC Auction 61 that closed in August of 2005 of a number of AMTS licenses, which were then issued to MCLM, including the "Southern Pacific" A-block AMTS license which includes all of the State of California except certain remote Sierra Nevada Mountain areas. Also, MCLM and Mobex obtained approval from the FCC, and thereafter consummated, the assignment and transfer from Mobex to MCLM of all of the site-based Mobex Licenses defined below, which include many licensed stations in California. By the aforementioned actions, MCLM became the principal competitor of Plaintiffs in acquiring AMTS radio service in the United States, and the principal prospective competitor of Plaintiffs in wireless services which may be provided by AMTS licenses. As a past and ongoing licensee and operator (or self-alleged operator) of AMTS "Public Coast" Stations and licenses under 47 C.F.R §20.9(a)(5), MCLM has had an obligation to operate as a "Commercial Mobile Radio Service" ("CMRS") licensee and operator within that term's meaning in the Federal Communications Act and FCC Rules. However, on information and belief, at many if not all of its AMTS Stations, MCLM: (i) did not and has not installed and operated the Systems required to meet the construction and operational requirements of AMTS CMRS Public Coast Stations, and did not file with States and the FCC the filings required of operating CMRS companies; and (ii) did not provide

"Interstate" communications, as opposed to "Intrastate" communications, as those terms are defined in the FCA and FCC Rules. (As used herein below, "MCLM" includes MCLM, and any entities in which MCLM or its principals have legal control, and any entities that have legal control of MCLM or its principals.)

11. Separate and distinct from requirements imposed upon MCLM under Federal law, Plaintiffs are informed and believe, and thereon allege, that MCLM has failed to meet State law filing, tax, and real-estate property-access requirements for States in which MCLM purports to own and operate AMTS CMRS Stations not previously cancelled by the FCC. For example, (i) MCLM failed to register in States, including but not limited to New York, Texas, Illinois and California, as an out-of-state legal entity to do business in the State, a threshold requirement by any CMRS Station operation in such states; (ii) in such states MCLM has not collected from its alleged customers and submitted in required state filings surcharges and other tax which states require of CMRS operators (and that are subject to the "State tax savings provision" in the Telecommunications Act of 1996, Public Law 104-104, §601(c)(2); (iii) in such states MCLM has not filed income tax returns; (iv) in such states MCLM has not obtained and maintained required legal access to the physical antenna structures (towers, tall buildings, etc.), equipment shelters, interconnection facilities, etc., which are required for actual construction and operation of its alleged still-valid AMTS stations; and (v) in such states MCLM has not paid other

sums and made other filings and satisfied other obligations imposed under State law.

12. Defendant Paging Systems, Inc. ("PSI") is, on information and belief, a corporation organized under the laws of the State of California with its principle place of business located in the City of Burlingame, in the County of San Mateo. PSI holds FCC site-based AMTS licenses for many locations in the United States (virtually all those not held by Mobex, then assigned to MCLM) and one FCC geographic AMTS license (for the Great Lakes region). Thus, as with MCLM, PSI was and remains a major competitor to Plaintiffs. PSI acted and continues to act in concert with Regionet, Mobex, and MCLM in obtaining and maintaining AMTS licenses throughout the United States and in planning and carrying out many of the unlawful actions that damaged Plaintiffs described herein. As a past and ongoing licensee and operator (or self-alleged operator) of AMTS "Public Coast" Stations and licenses under 47 C.F.R §20.9(a)(5), PSI has had an obligation to operate as a "commercial mobile radio service" ("CMRS") licensee and operator within that term's meaning in the Federal Communications Act and FCC Rules. However, on information and belief, at many if not all of its AMTS Stations, PSI: (i) did not and has not installed and operated the Systems required to meet the construction and operational requirements of AMTS CMRS Public Coast Stations, and did not file with States and the FCC the filings required of operating CMRS companies; and (ii) did not provide "Interstate" communications, as opposed to "Intrastate" communications, as those terms are defined in the FCA and FCC Rules. (As used herein below, "PSI"

includes PSI, and any entities in which PSI or its principals have legal control, and any entities that have legal control of PSI or its principals.)

13. Separate and distinct from requirements imposed upon PSI under Federal law, Plaintiffs are informed and believe, and thereon allege, that PSI has failed to meet State law filing, tax, and real-estate property-access requirements for States in which PSI purports to own and operate AMTS CMRS Stations not previously cancelled by the FCC. For example, (i) PSI failed to register in States, including but not limited to New York, Illinois, Oregon, Ohio, Florida and Maine, as an out-of-state legal entity to do business in the State, a threshold requirement by any CMRS Station operation in such states; (ii) in such states PSI has not collected from its alleged customers and submitted in required state filings surcharges and other tax which states require of CMRS operators (and that are subject to the "State tax savings provision" in the Telecommunications Act of 1996, Public Law 104-104, §601(c)(2); (iii) in such states PSI has not filed income tax returns; (iv) in such states PSI has not obtained and maintained required legal access to the physical antenna structures (towers, tall buildings, etc.), equipment shelters, interconnection facilities, etc., which are required for actual construction and operation of its alleged still-valid AMTS stations; and (v) in such states PSI has not paid other sums and made other filings and satisfied other obligations imposed under State law.

14. The true names and capacities of Defendants sued as Does 1 through 100 inclusive, are currently unknown to Plaintiffs, who sues these Defendants by fictitious names Plaintiffs will seek

leave to amend this Second Amended Complaint to show their true names and capacities when they have been ascertained. Plaintiffs are informed and believe and thereon allege that each of the Defendants designated as a Doe was in some manner responsible for the occurrences alleged in this Second Amended Complaint's causes of actions and proximately caused damage to Plaintiffs.

15. Plaintiffs are informed and believe and thereon allege that Defendants, and each of them, at all relevant times, were the agents, employees, servants, alter egos, representatives, and/or co-conspirators of their respective co-Defendants, and were at all times herein mentioned acting within the scope, purpose, and authority of such agency, employment, service representation and conspiracy, and with the permission, knowledge and consent of their co-Defendants.

DEFINITIONS

16. The terms "Automated Marine Telecommunications Service ['AMTS']" refers to a certain FCC-defined wireless radio service that includes 217-218 MGz, and 219-220 MHz radio "frequencies," sometimes also called "spectrum." In most cases, an AMTS license contains two or more AMTS Stations.

17. The terms "Automatic Termination Without Specific Commission Action" referred to herein shall mean the loss of license rights that occurs by operation of law (47 C.F.R. §§1.946, 1,955 and 80.49) when the licensee fails to construct a Station within the requisite Construction Period and the license for said Station terminates automatically without any action required on the part of the FCC.

18. The terms "Cancelled Licenses" referred to herein shall mean those licenses formerly held by Defendants that automatically terminated and were subsequently identified by the FCC as cancelled. (Exhibit A attached hereto provides a list of these licenses.)

19. The terms "Challenged Licenses -- Ongoing" referred to herein shall mean those licenses that Defendants failed to develop or that should be otherwise revoked and/or had automatically terminated, and that are subject to ongoing administrative proceedings before the FCC. (Exhibit B attached hereto provides a list of these licenses.)

20. The terms "Commercial Mobile Radio Services ['CMRS']" referred to herein shall mean that type of unique radio service defined by the FCA and Rules.

21. The terms "Construction Period" referred to herein shall mean the period after a license is granted within which construction must occur to preserve the grant; for a site-based AMTS license, the required component Stations must generally be "constructed" -- a system installed and commencement of its operation with certain FCC-approved equipment and certain minimum performance -- within two (2) years of the granting of the license.

22. The term "FCA" means the Federal Communications Act, also known as the Communications Act of 1934 (47 U.S.C. §151, et seq.)

23. The terms "FCC 2004 Audit" referred to herein shall mean the process and outcome of the FCC's review of Defendants' licenses pursuant to

which about 3 dozen licenses were revoked and de-listed from the FCC's database.

24. The terms "Geographic Licenses" referred to herein are licenses issued by the FCC in public auctions, and which authorized the licensees to construct and operate Stations within a defined geographic area.

25. The terms "ITS Wireless Market" referred to herein shall mean the supply and demand of Intelligent Transportation Systems Wireless Service.

26. The terms "Site-Based Licenses" referred to herein are licenses issued by the FCC prior to auctions on a first-come, first-serve basis, at no cost for the spectrum, and which authorize construction and operation of systems only at the specific Station locations applied for.

27. The term "Warehousing" referred to herein shall mean the practice of acquiring licenses for the purpose of holding rather than developing them, thereby preventing competitors from utilizing the licensed band and location or otherwise resulting in harm to competitors.

GENERAL ALLEGATIONS

28. Defendants' CMRS licenses upon which this Action is based fall generally into two categories, the Cancelled Licenses, on the one hand, and the Challenged Licenses -- Ongoing. To the degree that Plaintiffs rely upon the Cancelled Licenses in any stated cause of action related to a violation of any FCA Rule and /or FCA section, such violations are already subject of final FCC determination actions no longer subject to any appeal or right of appeal, and/or are violations that,

under FCC Rules, result in "automatic termination without specific Commission [FCC] action," where the violation is admitted or proven by any means, including under 47 C.F.R. §§ 1.955, 1.946 and 80.49 in FCC Rules. Plaintiffs allege that such determinations, noted above, act as res judicata or collateral estoppel as to the matters decided.

29. To the degree that a cause of action is based upon Challenged Licenses -- Ongoing, the allegedly wrongful and anticompetitive conduct involves both the violations of Federal law (including the "use it or lose it" rules), on the one hand, and violations of State law, on the other, principally registration and taxation requirements imposed under State law, unrelated to and independent of any FCC determination as to license cancellation or violations of the FCA. FCC determinations on the petitions to deny the Challenged Licenses -- Ongoing have not been subject to a fact-finding hearing akin to trial with due process protections, and the FCC routinely permits reconsideration upon discovery of new evidence, such as that gathered in State Court proceedings. The determinations at issue here are not yet final.

30. For ease of reference herein, Plaintiffs have segregated those claims based upon the Cancelled Licenses and those claims based upon Challenged Licenses – Ongoing, which are subject to ongoing administrative proceedings.

31. Herein, all references to filings and information provided to the FCC by Defendants all mean filings and information: (i) that Defendants publicly submitted, for their commercial purposes, for FCC publication on the FCC public website

(including its "Universal Licensing Service") for purposes of communicating about Defendants' licenses and licenses-related plans with Defendants' competitors (including Plaintiffs), customers, and others in the marketplace; and (ii) that Defendants in other ways (not through the FCC) released into the marketplace for such purposes.

32. Plaintiffs have cooperated with and have informed the FCC, the Defendants directly and the general public in public releases that they have cooperated to obtain and use their FCC licenses principally for providing new, advanced, wireless services essential for "Intelligent Transportation Systems" ("ITS") as defined and supported by the US Department of Transportation, the California Department of Transportation and other State of California agencies, the FCC, and other federal and State agencies. This is a unique, new wireless market in the United States (the "ITS Wireless Market"). In decisions regarding Defendants, the FCC has decided that AMTS license Systems and services may compete with LMS licensed Systems and services. LMS is defined by the FCC in 47 C.F.R §90.350 et. seq. as an ITS radio service. Defendants have conspired to and have in fact jointly acted, as further described below, to unfairly compete with and unlawfully restrain Plaintiffs in their pursuit of wireless services for the ITS Wireless Market in California and other States, and have also willfully conspired with one another to restrain competition and trade in the ITS Wireless Market itself, in California and other States.

33. Plaintiffs are pursuing said cooperative ITS wireless business plan for the ITS Market, each described above, under a research contract with the

University of California, a publicly funded State of California institution (the "UC Contract"). In addition, to raise funds for and further said cooperative ITS business plan, Plaintiffs have entered into contracts with several parties to sell, exchange, and acquire FCC licenses ("the FCC Licenses Assignment Contracts"). Further, Plaintiffs have contracts with third-parties, including the Berkeley Spectrum Investment Fund LLC and its Manager Channing Jones and affiliates, with principal offices in Berkeley, California, who provide financing for said business plan (the "Financing Contracts"). Plaintiffs and their interest holders also have executed charitable contributions, under agreements, and pledges for future contribution agreements, to nonprofit corporations: The Tides Foundation, with principal offices in San Francisco, California; and Skybridge Spectrum Foundation, with principal offices in Berkeley, California (the "Charitable Contracts"). Plaintiffs and their interest holders have also executed contracts with employees and other third-parties, all residents of the State of California, that provide certain non-voting non-controlling rights of future potential economic distributions (the "Distribution Contracts"). (The UC Contract, the FCC Licenses Assignment Contracts, the Financing Contracts, the Charitable Contracts, and the Distribution Contracts are herein together, the "Third Party Contracts," and the third-parties involved in these contracts, the "Contract Third Parties"). All of the Third Party Contracts involve provide value to the Contract Third Parties and Plaintiffs based upon the FCC AMTS licenses that the Plaintiffs have attempted to obtain and those actually obtained. Plaintiffs' rights

and obligations under of the Third Party Contracts, as well as their other past and prospective business, have been and will continue to be interfered with and adversely affected by the unlawful encumbrances to and other adverse actions against said AMTS licenses and license attempts by the unlawful actions of Defendants described herein ("Defendant License Encumbrances"). Plaintiffs informed Defendants of the Third Party Contracts, and the Defendant License Encumbrances were undertaken and are being sustained to knowingly cause damaged to Plaintiffs.

34. In addition, Defendants directly interfered with Third Party Contracts, including:

1. the contract between Thomas Kurian, a resident of the State of Nevada ("T. Kurian"), and Plaintiff ACL (the "Kurian Contract"); and

2. the contract between ACL and Northeast Utilities Service Company ("NUSCO"), with its principal offices in the State of Connecticut (the "NUSCO Contract").

The wrongful interference has included:

in the matter of the Kurian Contract, principally by acts of MCLM with cooperation from PSI:

1. causing financing, and otherwise supporting the former wife of T. Kurian to make false and otherwise baseless claims, including that T. Kurian representations and warranties in the Kurian Contract that he held, individually, free and clear title to a certain FCC AMTS license and had legal authority to enter the Kurian Contract to assign said license to ACL were false;

2. making false statements to T. Kurian, including about ACL, that has caused him to breach provisions in the Kurian Contract; and

3. by such actions, delaying the consummation of the transactions subject of the Kurian Contract and leading ultimately to the refusal of T. Kurian to consummate the transaction;

In the matter of the NUSCO Contract, principally by acts of PSI with cooperation from MCLM by making false claims to NUSCO and other parties of alleged encumbrances in a certain FCC AMTS license held by ACL that ACL agreed to assign to NUSCO under the NUSCO Contract. Said false claims of encumbrance were based upon PSI's false claim to AMTS licensed spectrum in the greater New York City region, including, based on said false spectrum claims of an "interference contour" extending into the southeast part of the State of Connecticut. These false claims were the direct and sole cause of ACL losing monetary rights and payments it otherwise would have obtained from NUSCO under the NUSCO Contract by delayed payments that ACL did receive from NUSCO under the NUSCO Contract, which caused other damages. The damages to ACL caused by said interference to the Kurian Contract and said interference to the NUSCO Contract are each in excess of One Million Dollars ($1,000,000) to date, and further damages are accruing. Defendants knew said false claims were false and made them with the intention to cause said interference and damages, and to restrain Plaintiffs in pursuit of their ITS Wireless Market plans and business, and to restrain trade in the ITS Wireless Market.

35. Beginning years ago, Defendants cooperatively applied for and were granted by the FCC certain site-based AMTS licenses for a large portion of the United States, including at least twenty-two (22) Stations in the State of California. The cooperation included, among other things:

an agreement, that was fully acted out, not to compete in seeking AMTS licenses, and to block others from obtaining AMTS licenses, in the context of FCC Orders and rules that required competition in AMTS including by allowing only one half of the total AMTS spectrum to any entity or closely affiliated or cooperative group;

coordinated license applications in most major markets of the nation;

co-location of license Stations in many regions;

coordinated reporting of most Station activations with unique language defective under FCC rules, including many entirely false activation reports;

coordinated false assertions before the FCC, competitors, and the general marketplace of AMTS license operations and valid licenses in many markets;

coordinated renewals of AMTS licenses that had terminated and that were thus fraudulent and in violation of FCC Rules and the FCA;

coordinated attempts to delay and block FCC Auction 57 when Defendants failed to raise substantial funds to compete in said auction against Plaintiffs, who had demonstrated to the FCC and Defendants a multiple of the cash that Defendants had to compete in the auction; and

scores of coordinated FCC filings and related public disclosures related to their AMTS licenses.

36. Defendants have alleged and still allege in the marketplace that they hold and operate AMTS licenses and operating Stations that are valid under FCC rules. Beginning in 2004, Plaintiffs obtained and continue to hold valid "geographic" (and previously several site-based) AMTS licenses and are developing business opportunities for them, principally in the ITS Wireless Market, in most areas of the United States in which Defendants allege they hold and operate valid AMTS A-block licenses.

37. "Geographic" licenses are issued by the FCC in public auctions, and authorize the licensees to construct and operate Stations within a defined geographic area. Each AMTS geographic license involves a number of States. "Site-based" licenses are issued by the FCC prior to auctions (and such licensing permanently ceases before the auctions) on a first-come, first-serve basis, at no cost for the spectrum, and authorize construction and operation of systems only at the specific Station locations applied for. FCC rules and Orders (i) prohibit the use under AMTS Geographic Licenses of the spectrum authorized in the license within a certain range of pre-existing, still-valid site-based licensed Stations for the same spectrum, but (ii) if any such site-based licensed Station is terminated for any reason, then the AMTS spectrum and service territory authorized by that Site-Based License "automatically reverts to" the surrounding geographic license.

38. Certain FCC Rules require that when a site-based AMTS license is issued, the required component Stations must be "constructed" (a system installed and its operation commenced with certain FCC-approved equipment and certain minimum performance) within two (2) years of the granting of the license (and any FCC-granted extension thereof upon a showing of good cause [the "Construction Period"]). If and when the licensee fails to construct a Station within the requisite Construction Period, the license for said Station terminates automatically without any action required on the part of the FCC. (47 C.F.R. §§1.946, 1.955 and 80.49.) In such a case, the holder of the former license is required to notify the FCC of said termination for cancellation (recognition of the automatic termination) in its public license database (currently, the electronic "Universal Licensing Service," or "ULS"). However, the license is terminated by action of law, regardless of whether the licensee has submitted the notification for cancellation. The FCC's ULS database includes both existing valid licenses and wireless frequencies of licenses that were cancelled or are otherwise available for current or future license applications. This FCC's license and frequency database is the official and primary source relied upon by parties seeking licenses, by parties seeking to buy or lease existing licensed spectrum or partner with licensees, and by parties considering bidding for Geographic Licenses in upcoming spectrum auctions including, in assessing the value and practicality of the licenses available at the auction (in large part based on the level of encumbrance by Site-Based Licenses listed as valid on the ULS database), in raising funds to bid in the

auction, etc. Surrender of licenses or licenses' component Stations that automatically terminated due to failure to meet the construction requirement by the end of the Construction Period or that otherwise terminated for said cancellation is required to prevent spectrum hoarding and Warehousing (described below), and since operation of any Station under a terminated license is prohibited by the FCA and FCC Rules: It is a fundamental requirement to have a valid license to operate any licensed spectrum in the United States, and equally fundamental to surrender terminated licenses. Failing to surrender licenses that are legally terminated because of failure to be constructed within the allotted time, or other cause, is unlawful conduct and is not a "statement" in any "proceeding."

39. On the other hand, if and when a licensee completes the required construction during the Construction Period, the licensee is required to notify the FCC of this by a filing, currently on FCC Form 601, with certain details and certifications under oath and under penalty of criminal prosecution and license revocation for false information. Such routine notification is required by the FCC for licensing under its rules and maintenance of its public licensing database, and such notification is a ministerial act and is not a "statement" in any official "proceeding" whether true of false.

40. A number of years ago, Defendants began applying for and obtaining from the FCC, for free, site-based AMTS licenses (see above) in a large percentage of the major urban markets and high-use waterways throughout the United States, including

virtually the entire lengths of the west coast of the States of California, Oregon and Washington. (Herein, all such licenses obtained in any way by Defendants in the United States are called the "Defendant Licenses"). The Defendants Licenses were obtained pursuant to a scheme of bandwidth hoarding and "Warehousing" whereby Defendant's purpose was not to construct and operate systems to service the public but to lock-up AMTS spectrum in major markets, and thereby lockout competition by Plaintiffs and other potential licensees, including by making the large surrounding geographical licenses for the same frequencies, which the FCC intended to auction in the near future, less economically viable to competitors, thus discouraging competition in the auction. As part of this scheme, Defendants intended eventually to obtain AMTS Geographic Licenses, when the FCC eventually auctioned off such licenses, at a substantial discount (compared to the price Defendants would have had to pay had they not by this scheme held the Defendants Licenses), because the extensive scope of the Defendants Licenses would discourage others from bidding in the auctions. Alternatively, Defendants intended to obtain other value from the Defendants Licenses such as by sale or lease of said licenses to successful bidders for these Geographic Licenses that would be encumbered by the Defendants' Licenses.

41. These and other actions and omissions by Defendants employed in their spectrum hoarding and Warehousing scheme, blocked Plaintiffs and other competitors of Defendants from obtaining from the FCC AMTS licenses they otherwise would have obtained, and suppressed competition in a relevant

market, and in other ways injured Plaintiffs and the market which AMTS spectrum serves. Spectrum hoarding and Warehousing is against the public-interest purpose of wireless licensing and license applications in the FCA, FCC Rules and also breaches the State of California and Federal laws protecting against anti-competitive conspiracies and actions.

42. Defendants failed to construct a major percentage of the Defendants Licenses component Stations within the Construction Period set by the FCC, described above. This was determined by an FCC 2004 Audit of Defendants Licenses in 2004, including Defendants admissions in said audit, after previously falsely reporting said Stations as properly and timely constructed. As described above, this resulted in cancellation of the licenses for said Stations since they had, as of the date of said failure, automatically terminated under law. For years following such failures to construct and resultant automatic terminations, Defendants deliberately hid said failures and terminations from the FCC, Plaintiffs and other competitors, and the relevant market, each of whom had a right to know the true facts. Instead, Defendants sent a series of false Station activation notices to the FCC (intended and effectively provided to said competitors and the market, also, by FCC publication) that falsely and fraudulently claimed that the required construction by the construction deadline would either imminently be satisfied or had been satisfied. The FCC initially accepted these as truthful factual reports of timely construction under its applicable rules, without any deliberative proceedings, in accordance with standard FCC procedure.

Subsequently, Defendants submitted various filings before the FCC falsely representing that these Stations were in operation and providing certain coverage and public service in an attempt to maintain Defendants Licenses and component Stations that had automatically terminated. (Some such false representations were made in contested proceedings before the FCC: In regards to these and other Defendants' communications with the FCC described herein, see paragraphs 13 and 14 above as to their usage herein.)

43. Regarding the remaining Defendants Licenses (those not terminated and cancelled as described above), for years after their applicable construction deadlines Defendants failed to file with the FCC either the required notice of construction or the required notice of failure to construct. Although in response to the above-noted 2004 FCC audit, Defendants responded that they did timely construct these Stations. (Defendants have continued to maintain these Stations in the marketplace, including by public releases over the Internet, operations with local two-way radio agents of Defendants, relationships with Motorola and other companies, etc.) Defendants have still not filed the required notices of construction with the FCC, nor filed required filings with the States involved (including departments of corporation and revenue), taken other actions required if the subject Stations were in fact in operation and not automatically terminated (without specific FCC action) under applicable FCC Rules and also subject to termination under applicable States laws. Such unlawful operation of said terminated license' Stations unlawfully block and damage Plaintiffs

because (1) the spectrum involved in terminated site based Stations "automatically reverts" to the surrounding geographic license (as noted above which in this case are Plaintiffs) and (2) failure to comply with state law rules and fees creates an unfair competitive environment.

44. Whether or not Defendants actually constructed these Stations, Defendants falsely and fraudulently maintained these as well as associated licensed Stations before the FCC by asserting before the FCC in ministerial license-application filings (which were not "proceedings") as well as various Defendants' public releases aimed at Plaintiffs, other competitors, and the relevant market, that they satisfied the sine qua non technical "coverage' requirement of site-based AMTS license by the coverage deadline, absent which the license automatically terminated. For site-based AMTS licenses, at minimum in all cases the required "coverage" consists of construction of two or more Stations with overlapping radio-service coverage under a certain technical standard which these Defendants' Stations demonstrably failed to satisfy, as Defendants knew. Defendants hid these defects from the FCC, Plaintiffs and other competitors, and the relevant market. As with the construction requirement and deadline an AMTS license "automatically terminates, without specific [FCC] action" if the coverage requirement is not satisfied by the coverage deadline (47 C.F.R. Section 1.946), and as noted above, licenses that have terminated must be returned to the FCC for cancellation so that the FCC and the public understand that the subject spectrum is available and to prevent spectrum hoarding and Warehousing. However, Defendants

have not returned any of these terminated licenses for cancellation, and therefore the FCC has not recognized such termination by cancellation of such Stations in its licensing database and the spectrum involved remains hoarded and warehoused, and not available to Plaintiffs by the above-noted "automatic reversion."

45. Said Defendants actions and inactions were done pursuant to a conspiracy between the Defendants to suppress competition in relevant economic and geographic markets for licenses and radio service, as well as to unlawfully obtain or maintain monopolies in certain geographic markets. In addition, said Defendants actions and inactions to withhold from Plaintiffs clear title and profitable use of AMTS spectrum they rightfully own free and clear, unjustly enriched Defendants and unlawfully converted substantial parts of Plaintiffs' geographic AMTS licenses, which are intangible assets clearly "merged in documents:" distinct FCC licenses in paper and electronic format.

46. During their history and to this day, intending to perpetuate the above-described wrongful purposes, actions and inactions, Defendants have repeatedly and falsely represented to Plaintiffs, other competitors, and the relevant market, including but not limited to, public disclosures filed with the FCC for FCC publication, that they were providing, with the required FCC approved equipment, actual maritime wireless services required of their AMTS licensed Stations throughout the nation, including most of the Atlantic, Pacific, Gulf Coast, and Great Lakes coast lines, and the Mississippi and other major inland waterway systems. Such maritime coverage was,

when Defendants obtained the Defendants' Licenses and up through these licenses' construction-coverage deadlines, the required service (service to customers on land was a permitted ancillary service if the required maritime service was provided and given priority). The failure to provide said required maritime service by the construction deadline resulted in "Automatic Termination Without Specific Commission Action." Defendants knew its broad public representations in this regard were not true and Defendants made these false representations for the unlawful purpose to hoard and warehouse spectrum; unfairly compete with, interfere, restrain, and damage Plaintiffs; restrain the competition and trade in relevant markets; and conceal and perpetuate conversion of spectrum that belong to Plaintiffs, as described above.

47. Similarly, for the same wrongful purposes and with the like damaging effects, Defendants previously and to this day publicly assert (including before the FCC, wireless equipment vendors, financing parties, competitors, and prospective end users of such licenses and wireless services based on such licenses) other deliberately false information to attempt to mislead the noted parties and relevant market as to the automatic termination status of many of Defendants licenses, including with regard to: (i) failure to construct and operate by the construction deadline Stations with the required CMRS-capable equipment that actually provided CMRS service; (ii) use of token equipment Systems in asserted Station construction and operation that did not transmit radio signals for purpose of actual commercial service, and/or (iii) was not installed and operated with any Station site

lease or other agreement from the site owner or manager (but was, as Defendants publicly disclosed to the FCC, used only to "commence testing to commence service" or the like), where the fact of such failure or the fact of such token Systems results in "Automatic Termination Without Specific Commission Action" under FCC rules for lack of timely required construction and commencement of commercial operations.

48. As stated above, Plaintiffs were the high bidders and eventual licensees of certain AMTS Geographic Licenses sold in the FCC's two AMTS auction held in 2004 and 2005, which in the aggregate covered all of the United States except for the area defined by the FCC centered around the Great Lakes. These Plaintiffs' geographic AMTS licenses are each for 1 MHz of AMTS spectrum, and are subject to an FCC rule which prohibits the operation of geographic-license Stations within a certain range of valid existing Stations under valid site-based AMTS licenses authorized to use the same 1 MHz. Defendants' wrongful maintenance of Site-Based Licenses as described above interfered with Plaintiffs' prospective business advantage to which Plaintiffs were entitled due to their having obtained the valid geographical licenses as set forth above, and also unlawfully withheld and converted spectrum Plaintiffs are entitled to utilize under the FCC Rules concerning "automatic termination" and related "automatic reversion" explained above. Further, Defendants continued publically to assert prior to the AMTS auctions the validity of the terminated Stations and made false representations as to site leases, construction, interconnecting and other services. Defendants representations

deliberately restrained and reduced the ability of Plaintiffs to raise funds and increased their cost of funds for participating in these auctions. This directly resulted in Plaintiffs loss of winning bids in these auctions in competition with Defendants, and other losses, resulting in damages in excess of $40 million, according to proof at trial.

49. Throughout their history and conduct described above and at all times, Defendants conspired to act and acted deliberately and in full knowledge of applicable California law, applicable FCC Rules and Federal Communications Act sections, and other applicable law, with the intent and expectation to carry out the unlawful purposes, actions, and concealments described above.

FIRST CAUSE OF ACTION

(Cartwright Act, Restraint of Trade — Bus. & Prof. Code §§16720 et seq.)

50. Plaintiffs incorporate by reference the allegations all preceding paragraphs as though fully set forth herein.

51. Defendants have violated California's anti-trust laws by committing the wrongful acts described herein, including but not limited to:

Hoarding and Warehousing licenses when Defendants knew or should have known that they could not and did not comply with their obligation to construct timely the licensed Stations and provide required coverage and service to the public;

Failing to pay fees, taxes and other costs imposed and required under State law in each State where Defendants purport to own and operate CMRS licenses, which violations unfairly reduce

Defendants' costs of doing business in violation of public policy;

Falsely representing to the industry, and in factual reporting to the FCC, that certain Stations had been or would imminently be timely constructed and operated to serve the public; these untrue statements, even as to licenses deemed valid or not yet revoked or fined by the FCC, nevertheless harmed and harm plaintiffs and restrained plaintiffs' business – for example, defendants directly discouraged potential and existing customers of plaintiffs from consummating spectrum transactions by falsely representing construction status and coverage, intercommunications, antenna site leases and other aspects of service.

Deliberately failing, for years after licensed Stations automatically terminated due to Defendants' failure to construct timely Stations, to report such failure and termination to the FCC, as required for FCC cancellation of the Station licenses and for public disclosures thereof, including to Plaintiffs;

Falsely representing to the industry, and in factual reporting to the FCC, that Defendants had complied with their obligation to provide overlapping, continuous coverage along certain minimum lengths of waterways when in fact they failed to do so, including since Defendants had not constructed many of the Stations it was required by their licenses to construct, thereby inducing customers and potential customers from doing business with plaintiffs;

Falsely representing to the FCC and other parties that Defendants were providing required service to the maritime users;

Falsely representing to the FCC and other parties that Defendants used system equipment that complied with all FCC requirements for AMTS;

Renewing licenses that had terminated, and operating stations without any FCC license, and failing to disclose these unlawful actions to the FCC and public;

As the FCC has determined by final action: in competition against Plaintiffs, MCLM falsely represented to the FCC that it was qualified to obtain a 35% bidding credit for the FCC "Auction 61" of AMTS licenses, and that it did not have various affiliates that it in fact did have, and other false representations; and bidding in said auction utilizing the falsely obtained bidding credit.

These and the other acts reference herein constitute a per se violation of the Act. Untrue statements, even as to licenses deemed valid or not yet revoked or fined by the FCC, nevertheless harmed and harm plaintiffs and restrained plaintiffs' business – for example, defendants directly discouraged potential and existing customers of plaintiffs from consummating spectrum transactions by falsely representing construction status and coverage, intercommunications, antenna site leases and other aspects of service.

52. In doing the acts described above, Defendants combined and conspired with one other for the unlawful purpose of restraining trade or preventing competition in relevant markets, and or

unlawfully obtaining or maintaining or attempting to maintain monopolies in relevant markets, in violation of California Bus. & Prof. Code §§16720 et seq.

53. Plaintiffs have been injured in their business or property by reason of Defendants' awful combination or conspiracy, in an amount to be proven at trial. The damages are substantial, in excess of $40 million. Plaintiffs are entitled to an award of three times the damages they sustained, preliminary and /or permanent injunctive belief, and reasonable attorneys' fees pursuant to Bus. & Prof. Code §16750, and prejudgment interest on their damages pursuant to Bus. & Prof. Code § 16761.

WHEREFORE, Plaintiffs pray judgment as hereinafter set forth.

SECOND CAUSE OF ACTION

(Interference With Prospective Economic Advantage)

(Cancelled Licenses Only)

54. Plaintiffs incorporate by reference the allegations of all preceding paragraphs as though fully set forth herein.

55. At all times alleged herein, as qualified and financially capable licensees and license applicants, Plaintiffs had an economically beneficial relationship with the FCC as the subject licensing authority (required for any FCC license-based wireless business), as well as with various other parties in the wireless industry critical to the competitive and economic viability of Plaintiffs including equipment providers, financiers, partners for building and operating wireless systems, and end users of FCC licenses and licensed wireless services. The existence of these relationships was known to

Defendants at the times that they committed the acts complained of herein. Plaintiffs were in the business of obtaining FCC licenses for wireless services, including AMTS licenses, and developing businesses based on new wireless communications services, described above, in which good and timely business relations with such parties as noted above is essential.

56. Defendants intended to interfere with Plaintiffs' economic relationship with such essential parties by the deliberate, wrongful acts described herein including but not limited to:

Hoarding and Warehousing the Cancelled Licenses (Exhibit A hereto) when Defendants knew or should have known that they could not and did not comply with their obligation to timely construct the licensed Stations and provide required coverage and service to the public;

Falsely representing to the FCC and other parties that certain Stations had been or would imminently be timely constructed and operated to serve the public untrue statements, even as to licenses deemed valid or not yet revoked or fined by the FCC, nevertheless harmed and harm plaintiffs and restrained plaintiffs' business – for example, defendants directly discouraged potential and existing customers of plaintiffs from consummating spectrum transactions by falsely representing construction status and coverage, intercommunications, antenna site leases and other aspects of service;

Deliberately failing, for years after licensed Stations automatically terminated due to Defendants failure to timely construct the Stations,

to report such failure and termination to the FCC as required, for FCC cancellation of the Station licenses and for public disclosures thereof, including to Plaintiffs;

Falsely representing to the FCC and other parties that Defendants had complied with their obligation to provide overlapping, continuous coverage along certain minimum lengths of waterways when in fact they failed to do so, including since Defendants had not constructed many of the Stations they were required to construct, and by such, evading automatic termination of the subject Stations due to lack of required coverage at the construction-coverage deadline;

Making false public and private statements to the FCC and other parties essential to Plaintiffs' business, as set forth above, so as to interfere with Plaintiffs' business relations;

Falsely representing to the FCC and other parties that Defendants were providing required service to the maritime users;

Falsely representing to the FCC and other parties that Defendants used system equipment that complied with all FCC requirements for AMTS;

Renewing licenses that had terminated, and operating stations without any FCC license, and failing to disclose these unlawful actions to the FCC and public;

As the FCC has determined by final action in competition against Plaintiffs, MCLM falsely represented to the FCC that it was qualified to obtain a 35% bidding credit for the FCC "Auction

G1" of AMTS licenses, and that it did not have various affiliates that it in fact did have, and other false representations; and bidding in said auction utilizing the falsely obtained bidding credit.

57. The actions and deliberate omissions of Defendants described herein took place within the two (2) years preceding the filing of the Complaint, or were concealed by Defendants and were not reasonably discovered by Plaintiffs until less than two (2) years before the date the Complaint was filed.

58. The actions and deliberate omissions of Defendants described herein interfered with Plaintiffs' relationship with such essential parties, including additional business and financing from existing customers and investors, in the various ways indicated above including, but not limited to:

Plaintiffs were not able to seek, obtain, and use for various economic advantages AMTS spectrum Plaintiffs were entitled to: (i) in the Defendants Licenses that had fully or in part terminated by operation of law and should have been surrendered by Defendants, some of which would have been available to Plaintiffs to apply for prior to the suspension of site based licensing (where Plaintiffs were indeed applying for all available major areas of the nation that were available), and some of which, when "automatically terminated, "automatically reverted" to Plaintiffs and, (ii) in other Geographic Licenses which Plaintiffs would have purchased in the first and second AMTS auction had their financial resources not been depleted as noted above by their defense of and attempts to mitigate Defendants' actions and

omissions to unfairly compete with, interfere, restrain, and damage and had Defendants not interfered in Plaintiffs' relations with potential investors and sources of financing;

Plaintiffs' ability and results in pursuing and obtaining certain financing including with respect to the two FCC AMTS license auctions, as well as favorable relations with equipment vendors, joint-venture candidate companies, end users of licenses and licensed systems, and others of importance to Plaintiffs licenses-based business plan, were reduced, delayed, and damaged;

Plaintiffs have been delayed in, and reduced or prevented from, attempting, securing and closing certain licenses spectrum-sale and license-lease opportunities (i.e., sales and leases by Plaintiffs to third parties of Plaintiffs' valid licenses or portions thereof);

Plaintiffs have incurred substantial legal and other costs in its attempts to mitigate and avoid the damages caused by Defendants' actions and omissions set forth herein. This, and the major delays in Plaintiffs' plans and actions caused by such Defendants' actions and omissions, have undermined Plaintiffs' ability to focus on and secure economic advantages arising out of timely and favorable relations with and actions before the FCC and the other above noted parties essential to Plaintiffs' wireless business. Had Defendants acted in compliance with their legal obligations, Plaintiffs had the financial and other capability to and would have (i) applied for and obtained the AMTS spectrum in the Defendants Licenses and placed this spectrum into operation of Stations, leases, sales,

and other uses, and (ii) succeeded in securing other economic advantages indicated above in relation to the FCC, equipment companies, financing parties, and others in the wireless industry. Defendants' interference with Plaintiffs' business relationship with the FCC and such other parties has caused damages in an amount to be proven at trial.

59. Due to Defendants' actions and omissions, Plaintiffs refrained from or were otherwise blocked from seeking and obtaining from the FCC the spectrum in the Defendants Licenses and elsewhere in the United States from the time Plaintiffs were formed until the FCC terminated any possibility of seeking such spectrum by its freezing all licensing in the AMTS service for a period of time prior to its new exclusive method of AMTS licensing by auctioning Geographic Licenses. As a direct and proximate result of Defendants' interference, Plaintiffs incurred damages in an amount to be proven at trial.

60. The actions and deliberate omissions of Defendants were fraudulent, oppressive and malicious and were done either with the intent to injure the business of Plaintiffs or, at minimum in some cases, done with reckless disregard of a high probability that Plaintiffs would be damaged thereby. Plaintiffs are therefore entitled to an award of punitive damages from Defendants in an amount appropriate to punish and make an example of Defendants.

WHEREFORE, Plaintiffs pray judgment as hereinafter set forth.

THIRD CAUSE OF ACTION

(Interference With Prospective Economic Advantage)

(Challenged Licenses -- Ongoing)

61. Plaintiffs incorporate by reference the allegations of all preceding paragraphs as though fully set forth herein.

62. At all times alleged herein, as qualified and financially capable licensees and license applicants, Plaintiffs had an economically beneficial relationship with the FCC as the subject licensing authority (required for any FCC license-based wireless business), as well as with various other parties in the wireless industry critical to the competitive and economic viability of Plaintiffs including equipment providers, financiers, partners for building and operating wireless systems, and end users of FCC licenses and licensed wireless services. The existence of these relationships was known to Defendants at the times that they committed the acts complained of herein. Plaintiffs were in the business of obtaining FCC licenses for wireless services, including AMTS licenses, and developing businesses based on new wireless communications services, described above, in which good and timely business relations with such parties as noted above is essential.

63. Defendants intended to interfere with Plaintiffs' economic relationship with such essential parties by the deliberate, wrongful acts described herein including but not limited to:

Hoarding and Warehousing the Challenged Licenses -- Ongoing (Exhibit B hereto) when Defendants knew or should have known that they could not and did not comply with their

obligation to timely construct the licensed Stations and provide required coverage and service to the public;

Falsely representing to the FCC and other parties that certain Stations had been or would imminently be timely constructed and operated to serve the public;

Deliberately failing, for years after licensed Stations automatically terminated due to Defendants failure to timely construct the Stations, to report such failure and termination to the FCC as required, for FCC cancellation of the Station licenses and for public disclosures thereof, including to Plaintiffs;

Falsely representing to the FCC and other parties that Defendants had complied with its obligation to provide overlapping, continuous coverage along certain minimum lengths of waterways when in fact it failed to do so, including since Defendants had not constructed many of the Stations it was required by its licenses to construct, and by such, evading automatic termination of the subject Stations due to lack of required coverage at the construction coverage deadline;

Making false public and private statements to the FCC and other parties essential to Plaintiffs' business, as set forth above, so as to interfere with Plaintiffs' business relations;

Falsely representing to the FCC and other parties that Defendants were providing required service to the maritime users;

Falsely representing to the FCC and other parties that Defendants used system

equipment that complied with all FCC requirements for AMTS;

Renewing licenses that had terminated, and operating stations without any FCC license, and failing to disclose these unlawful actions to the FCC and public;

64. The actions and deliberate omissions of Defendants described herein took place within the two (2) years preceding the filing of the Complaint herein, or were concealed by Defendants and were not reasonably discovered by Plaintiffs until less than two (2) years before the date the Complaint was filed.

65. The actions and deliberate omissions of Defendants described herein interfered with Plaintiffs' relationship with such essential parties, including additional business and financing from existing customers and investors, in the various ways indicated above including, but not limited to:

Plaintiffs were not able to seek, obtain, and use for various economic advantages AMTS spectrum Plaintiffs were entitled to: (i) in the Defendants Licenses that had fully or in part terminated by operation of law and should have been surrendered by Defendants, some of which would have been available to Plaintiffs to apply for prior to the suspension of site-based licensing (where Plaintiffs were indeed applying for all available major areas of the nation that were available), and some of which, when "automatically terminated, "automatically reverted" to Plaintiffs and, (ii) in other Geographic Licenses which Plaintiffs would have purchased in the first and second AMTS auction had their financial resources not been

depleted as noted above by their defense of and attempts to mitigate Defendants' actions and omissions to unfairly compete with, interfere, restrain, and damage and had Defendants not interfered in Plaintiffs' relations with potential investors and sources of financing;

Plaintiffs' ability and results in pursuing and obtaining certain financing including with respect to the two FCC AMTS license auctions, as well as favorable relations with equipment vendors, joint-venture candidate companies, end users of licenses and licensed systems, and others of importance to Plaintiffs licenses-based business plan, were reduced, delayed, and damaged;

Plaintiffs have been delayed in, and reduced or prevented from, attempting, securing and closing certain licenses spectrum-sale and license-lease opportunities (i.e., sales and leases by Plaintiffs to third parties of Plaintiffs' valid licenses or portions thereof);

Plaintiffs have incurred substantial legal and other costs in its attempts to mitigate and avoid the damages caused by Defendants' actions and omissions set forth herein. This, and the major delays in Plaintiffs' plans and actions caused by such Defendants' actions and omissions, have undermined Plaintiffs' ability to focus on and secure economic advantages arising out of timely and favorable relations with and actions before the FCC and the other above-noted parties essential to Plaintiffs' wireless business. Had Defendants acted in compliance with their legal obligations, Plaintiffs had the financial and other capability to and would have (i) applied for and obtained the AMTS

spectrum in the Defendants Licenses and placed this spectrum into operation of Stations, leases, sales, and other uses, and (ii) succeeded in securing other economic advantages indicated above in relation to the FCC, equipment companies, financing parties, and others in the wireless industry. Defendants' interference with Plaintiffs' business relationship with the FCC and such other parties has caused damages in an amount to be proven at trial.

66. Due to Defendants' actions and omissions, Plaintiffs refrained from or were otherwise blocked from seeking and obtaining from the FCC the spectrum in the Defendants Licenses and elsewhere in the United States from the time Plaintiffs were formed until the FCC terminated any possibility of seeking such spectrum by its freezing all licensing in the AMTS service for a period of time prior to its new exclusive method of AMTS licensing by auctioning Geographic Licenses. As a direct and proximate result of Defendants' interference, Plaintiffs incurred damages in an amount to be proven at trial.

67. The actions and deliberate omissions of Defendants were fraudulent, oppressive and malicious and were done either with the intent to injure the business of Plaintiffs or, at minimum in some cases, done with reckless disregard of a high probability that Plaintiffs would be damaged thereby. Plaintiffs are therefore entitled to an award of punitive damages from Defendants in an amount appropriate to punish and make an example of Defendants.

WHEREFORE, Plaintiffs pray judgment as hereinafter set forth.

FOURTH CAUSE OF ACTION

(Fraud)

(Cancelled Licenses Only)

68. Plaintiffs incorporate the allegations of all preceding paragraphs as though fully set forth herein.

69. At all times when Defendants affirmatively and falsely represented to Plaintiffs and other competitors that Defendants Licenses' Stations had been constructed by the deadline which caused the FCC to maintain such Stations as valid in its public licensing database and files, Defendants knew and intended that Plaintiffs would rely on those representations and would refrain from applying to the FCC for the AMTS spectrum in such Stations licenses because Plaintiffs would reasonably believe that the spectrum in these Stations was unavailable. The specific licenses for which defendants made misrepresentations are attached hereto as Exhibit A. In the following filings, on the following dates, Defendants falsely said Defendants had constructed licenses and had already "encumbered" the market:

Renewal applications submitted prior to the Y2004 FCC audits that included stations which Defendants admitted to not having constructed in the audits.

PSI and Mobex submitted renewal applications for stations that were not constructed. These renewal applications were publicly available on the FCC's ULS. Plaintiffs and the public use the FCC's ULS to see what licenses exist and that are reported as constructed, renewed, etc.

1. 1) Paging Systems, Inc.

(i) Renewal application, File No. 0001282313, filed 4/21/03, signed by Susan Cooper, containing 9 stations never constructed. Granted by the FCC 6/18/03.

(ii) Renewal application, File No. 0001282315, filed 4/21/03, signed by Susan Cooper, the only 2 stations for the subject license were never constructed. Granted by the FCC 6/18/03.

(iii) Renewal application, File No. 0001282314, filed 4/21/03, signed by Susan Cooper, containing 4 stations never constructed. Granted by the FCC 6/18/03.

(iv) Renewal application, File No. 0000457522, filed 5/10/01, signed by Susan Cooper, the only station for the subject license was never constructed. Granted by the FCC 7/2/01.

(v) Renewal application, File No. 0000457528, filed 5/10/01, signed by Susan Cooper, the only station for the subject license was never constructed. Granted by the FCC 7/2/01.

(vi) Renewal application, File No. 0001249704, filed 3/25/03, signed by Susan Cooper, the only station for the subject license was never constructed. Granted by the FCC 5/15/03.

2. 2) Mobex Network Services LLC

(i) Renewal application, File No. 0001768691, filed 6/10/04,

signed by John Reardon, containing several stations that were never constructed per Mobex's response to the audits. For several of the non-constructed stations this was the second time Mobex sought renewal since a previous renewal application was also submitted for the subject call sign, KAE889, years before. That previous renewal application is not available on FCC ULS, but available in paper format from the FCC.

(ii) Renewal application, File No. 0000443747, filed 4/30/01 (by Regionet, the previous name of Mobex), signed by Paul Vander Heyden, containing a station that was never constructed per Mobex's response to the audits. Granted by the FCC on 7/2/01.

(iii) Renewal application, File No. 0001600664, filed 1/30/04, signed by Kevin Dilger, containing two stations that were not timely constructed and had automatically terminated without specific Commission action.

Station Activation Notices submitted by Mobex and PSI for station(s) that were not constructed.

3. 1) PSI

i. Activation Notice for WHG545, Maui, Hawaii, filed dated 8/7/97. Plaintiffs have found evidence that this station was never constructed.

4. 2) Mobex

i. Activation Notices for California stations at: Eureka, San Diego, Santa Barbara, Vacaville, Loma Ridge, Chula Vista, Ventura, Crestline, Ramona, and Thousand Palms; and for Oregon stations at: Eugene and Portland.

Renewal applications submitted after the Y2004 audits

5. 1) PSI

i. Renewal application, File No. 0002257822, filed 7/28/05, signed by Susan Cooper, containing one station for which Plaintiffs found evidence from third parties including the State of Hawaii that PSI did not construct one of the stations it sought to renew.

Paging Systems, Inc. (PSI) and Mobex Network Services LLC (Mobex) responses to the Y2004 FCC audits (copies of these responses are attached at the end)

Between the two Y2004 FCC audits, some of the "yes" answers are fraudulent that PSI and Mobex had timely constructed certain AMTS stations

6. 1) PSI response of 6/22/04 to the FCC's 5/26/04 letter requesting additional information on certain AMTS stations

7. 2) PSI response of 10/11/04 to the FCC's 9/13/04 letter requesting additional information on certain AMTS stations.

8. 3) Mobex response of 6/25/04 to the FCC's 5/26/04 letter requesting additional information on certain AMTS stations

9. 4) Mobex response of 10/13/04 to the FCC's 9/13/04 letter requesting additional information on certain AMTS stations.

Mobex Communications, Inc. (controlling interest holder of Mobex Network Services LLC) and PSI Comments and Reply Comments in the public proceeding concerning Auction No. 57, the first geographic AMTS auction.

The below filings were made prior to start of Auction No. 57.

10.1) Mobex Communications, Inc. ("MCI") Comments filed on 4/23/04 regarding DA 04-954 and Auction No. 57, submitted by attorney, Robert Gurss. MCI was the controlling interest of Mobex prior to Mobex being acquired by MCLM. In these Comments, MCI asked that the FCC delay the start of the auction so that bidders could more fully understand the amount of incumbents blocking the spectrum along most of the coasts and major populated areas. It specifically refers to a PSI license, KSC779, and its own license, KAE889, as examples of the amount of incumbents. For KAE889, MCI states it has 49 locations along the Pacific Coast. However, per the Mobex responses to the Y2004 audits, 28 of these 49 stations were never constructed and MCI knew this at the time of making it comments in this public proceeding. Also, PSI admitted in the audits that it had not constructed several of its stations for KSC779 (PSI supported the comments of MCI—see immediate below). MCI did not admit that several of the stations at the time of making these Comments were not constructed.

11.2) PSI Reply Comments filed 4/30/04 regarding DA 04-954 and Auction No. 57, in which PSI states it supports the Comments of MCI (see immediate above).

70. The fraudulent statements in Defendants' FCC filings are largely based upon admissions by Defendants in other FCC filings (principally the "FCC 2004 Audit" of Defendants'

AMTS licenses construction status) and which admissions the FCC accepted and acted upon in actions (principally license cancellations) that are now final and no longer subject to appeal. In specific renewal applications principally in 2001, 2002 and 2003, Defendants falsely represented that the subject licenses were valid and had met construction and operation requirements. At all times when Defendants failed to surrender the Defendants' licenses to the FCC for cancellation of component Stations not constructed or constructed as required by the construction deadline pursuant to FCC Rules so that the FCC would cancel the Station's authority in its public licensing database, Defendants knew and intended that Plaintiffs would rely on Defendants' failure to surrender the Defendants Licenses and consequently FCC maintenance of such Stations as valid in its public licensing database, and would refrain from applying for the AMTS spectrum in such Stations because Plaintiffs would reasonably believe that the spectrum in these Stations were unavailable. Plaintiffs did reasonably rely on those representations and as a result incurred damages in an amount to be proven at trial.

71. Havens met with Fred Daniels and Paul vander Heyden of Regionet (predecessor of Mobex) at the offices of Regionet in Southern California in mid-1999. Mr. Daniels and Mr. vander Heyden provided declarations for MCI comments filed in WT Docket No. 02-8 on March 1, 2002 that confirm this meeting with Mr. Havens. At this meeting, Mr. Daniels and Mr. vander Heyden represented to Mr. Havens that the Regionet licensed stations were constructed and operated as then reported to the FCC, when in the FCC 2004

Audits, Mobex admitted that several of these stations were not constructed. Mr. Daniels and Mr. vander Heyden also represented to Mr. Havens that they had an option to obtain all of the PSI licenses. This was fraudulent if they adhered to FCC rules that required disclosure of the party in control of a license on a fully diluted basis as if all options had been converted. Plaintiff did not and could not with reasonable dialogue, determine the falsity of these representations until within three (3) years of the filing of the Complaint.

72. PSI has maintained in two FCC proceedings and in public records that it timely constructed and operated a station on top of the old World Trade Center in New York, a space owned by WNET. Plaintiffs are informed and believe that PSI never had a permit to operate on the building or had permission to use the broadcaster antenna mast space belonging to WNET at which PSI claims to have built. PSI never built on the broadcaster antenna mast that PSI says it built on. PSI's actions in maintaining its New York stations, WQA216, have interfered with business transactions of Plaintiffs and have blocked their specific business opportunities regarding sale of some AMTS spectrum in New York.

73. Plaintiffs did in fact reasonably rely on the above noted intentional misrepresentations and omissions by Defendants in refraining from and applying for the AMTS spectrum licenses in the Defendants Licenses.

74. Due to Defendants' actions and omissions, Plaintiffs refrained from or were otherwise blocked from seeking and obtaining from

the FCC the spectrum in the Defendants Licenses and elsewhere in the United States from the time Plaintiffs were formed until the FCC terminated any possibility of seeking such spectrum by its freezing/suspending all licensing in the AMTS service for a period of time prior to its new exclusive method of AMTS licensing by auctioning Geographic Licenses, and were damaged thereby in an amount to be proven at trial.

75. Defendant MCLM fraudulently represented to the FCC and to other bidders, including Plaintiffs: (i) that it was qualified to obtain a 35% bidding credit for Auction 61, when in fact it was not; and (ii) that it did not have various FCC-defined "affiliates" that it in fact did have. The FCC has determined said facts, just stated, and such determinations were not appealed by MCLM and have become final. These false representations resulted in MCLM obtaining unfair bidding advantage in Auction 61 that caused the loss of licenses to Plaintiffs that they otherwise would have won at this auction had it not been for this unfair advantage and caused Plaintiffs to pay more for licenses they did win in this auction than they would have paid had it not been for this unfair advantage. As a result, Plaintiffs incurred damages in an amount to be proven at trial.

76. The actions of Defendants were fraudulent, oppressive and malicious and were done either with the intent to injure the business of Plaintiffs or done with reckless disregard of a high probability that Plaintiffs would be damaged thereby. Plaintiffs is therefore entitled to an award of punitive damages from Defendants in an amount

appropriate to punish and make an example of Defendants.

WHEREFORE, Plaintiffs pray judgment as hereinafter set forth.

FIFTH CAUSE OF ACTION

(Fraud)

(Challenged Licenses -- Ongoing)

77. Plaintiffs incorporate the allegations of all preceding paragraphs as though fully set forth herein.

78. At all times when Defendants affirmatively and falsely represented to Plaintiffs and other competitors that Defendants Licenses' Stations had been constructed by the deadline which caused the FCC to maintain such Stations as valid in its public licensing database and files, Defendants knew and intended that Plaintiffs would rely on those representations and would refrain from applying to the FCC for the AMTS spectrum in such Stations licenses because Plaintiffs would reasonably believe that the spectrum in these Stations was unavailable. Plaintiffs did reasonably rely on those representations and as a result incurred damages in an amount to be proven at trial.

79. At all times when Defendants failed to surrender the Defendants' licenses to the FCC for cancellation of component Stations not constructed or constructed as required by the construction deadline pursuant to FCC Rules so that the FCC would cancel the Station's authority in its public licensing database, Defendants knew and intended that Plaintiffs would rely on Defendants' failure to surrender the Defendants Licenses and consequently FCC maintenance of such Stations as valid in its

public licensing database, and would refrain from applying for the AMTS spectrum in such Stations because Plaintiffs would reasonably believe that the spectrum in these Stations was unavailable. Plaintiffs did reasonably rely on those representations and as a result incurred damages in an amount to be proven at trial.

80. Plaintiff Warren Havens met directly with the owners of Regionet and others in 1999 in Southern California at the regional headquarters, Fred Daniels and Paul Vanderhaden represented that they had options on all of PSI's licenses.

81. Plaintiffs did in fact reasonably rely on the above noted intentional misrepresentations and omissions by Defendants in refraining from and applying for the AMTS spectrum licenses in the Defendants Licenses.

82. Due to Defendants' actions and omissions, Plaintiffs refrained from or were otherwise blocked from seeking and obtaining from the FCC the spectrum in the Defendants Licenses and elsewhere in the United States from the time Plaintiffs were formed until the FCC terminated any possibility of seeking such spectrum by its freezing/suspending all licensing in the AMTS service for a period of time prior to its new exclusive method of AMTS licensing by auctioning Geographic Licenses, and were damaged thereby in an amount to be proven at trial.

83. The actions of Defendants were fraudulent, oppressive and malicious and were done either with the intent to injure the business of Plaintiffs or done with reckless disregard of a high probability that Plaintiffs would be damaged

thereby. Plaintiffs is therefore entitled to an award of punitive damages from Defendants in an amount appropriate to punish and make an example of Defendants.

WHEREFORE, Plaintiffs pray judgment as hereinafter set forth.

SIXTH CAUSE OF ACTION

(Negligent Misrepresentation)

84. Plaintiffs incorporate by reference the allegations of all preceding paragraphs as though fully set forth herein.

85. At all times when Defendants represented to the FCC for reporting in its public licensing database, as well as in various other FCC publicly-available filings and proceeding pleadings, that Stations in the Defendants Licenses had been constructed and their coverage requirement satisfied, or otherwise explicitly or impliedly represented that the Defendants Licenses had not terminated by operation of law after the construction-coverage deadline, Defendants made such representations without any reasonable grounds to believe they were true.

86. The true facts were that the Defendants Licenses and/or a major percentage of their component Stations were terminated by operation of law, and under FCC Rules should have been surrendered to the FCC for cancellation in its public licensing database and made available for re-licensing by the FCC.

87. Plaintiffs relied on both Defendants' explicit and implicit representations, including its omission of the required return to the FCC of the terminated licenses, that the construction

requirements of the Defendants Licenses and their component Stations had been met. Plaintiffs refrained from applying for the spectrum in the Defendants Licenses because Plaintiffs reasonably believed that said spectrum was unavailable for licensing.

88. Due to Defendants' negligent misrepresentations, Plaintiffs refrained from or were otherwise blocked from seeking and obtaining from the FCC the spectrum in the Defendants Licenses and elsewhere in the nation from the time Plaintiffs were formed until the FCC terminated any possibility of seeking such spectrum by its freezing all licensing in the AMTS service for a period of time prior to its new exclusive method of AMTS licensing by auctioning Geographic Licenses, and Plaintiffs were damaged thereby in an amount to be proven at trial

89. When MCLM represented to the FCC: (i) that it was qualified to obtain a 35% bidding credit for Auction 61, when in fact it was not;, and (ii) that that it did not have various FCC-defined "affiliates" that it in fact it did have -- MCLM had no reasonable basis for believing that these representations were true. The FCC has determined said facts, just stated and such determinations were not appealed by MCLM and have become final. These negligent misrepresentations resulted in MCLM obtaining unfair bidding advantage in Auction 61 that caused the loss of licenses to Plaintiffs that they otherwise would have won at this auction had it not been for this unfair advantage, and caused Plaintiffs to pay more for licenses they did win in this auction than they would have paid had it not been for this unfair advantage.

90. As a result of Defendant's negligent misrepresentations, as alleged above, Plaintiffs has been damaged in an amount to be proven at trial.

WHEREFORE, Plaintiffs pray judgment as hereinafter set forth.

SEVENTH CAUSE OF ACTION

(Unfair Competition — Bus. & Prof. Code §§17200 et seq.)

(Cancelled Licenses Only)

91. Plaintiffs incorporate by reference the allegations all preceding paragraphs as though fully set forth herein.

92. The acts and omissions of Defendants regarding licenses cancelled as a result of the FCC's 2004 audit, as set forth above, constitute "unlawful, unfair or fraudulent business practices" within the meaning of California Business and Professions Code section 17200.

93. The Court should grant preliminary and/or permanent injunctive relief to prevent further unfair business practices of the Defendants, and award Plaintiffs their reasonable attorneys' fees for prosecuting this action as permitted by law.

94. The Court should order the disgorgement of all profits, whether in cash or kind, obtained by Defendants through their unlawful, unfair and fraudulent business practices.

WHEREFORE, Plaintiffs pray judgment as hereinafter set forth.

EIGHTH CAUSE OF ACTION

(Unfair Competition — Bus. & Prof. Code §§17200 et seq.)

(Challenged Licenses -- Ongoing)

95. Plaintiffs incorporate by reference the allegations all preceding paragraphs as though fully set forth herein.

96. The acts and omissions of Defendants regarding the Challenged Licenses -- Ongoing, as set forth above, constitute "unlawful, unfair or fraudulent business practices" within the meaning of California Business and Professions Code section 17200.

97. The Court should grant preliminary and/or permanent injunctive relief to prevent further unfair business practices of the Defendants, and award Plaintiffs their reasonable attorneys' fees for prosecuting this action as permitted by law.

98. The Court should order the disgorgement of all profits, whether in cash or kind, obtained by Defendants through their unlawful, unfair and fraudulent business practices.

WHEREFORE, Plaintiffs pray judgment as hereinafter set forth.

NINTH CAUSE OF ACTION

(Intentional Interference with Contracts)

99. Plaintiffs incorporate by reference the allegations of all preceding paragraphs as though fully set forth herein.

100. The Kurian Contract was a valid contract. Defendants knew of the Kurian Contract.

101. Defendants intentionally undertook the wrongful acts set forth herein in order to disrupt or induce a breach of the Kurian contract. Defendants knew that their acts were substantially certain to disrupt or induce a breach of the Kurian contract.

102. The Kurian contract was actually disrupted and breached because of Defendants'

conduct, and as a direct and proximate result, the Plaintiffs suffered damages in an amount to be proven at trial.

103. The NUSCO Contract was a valid contract. Defendants knew of the NUSCO Contract.

104. Defendants intentionally undertook the wrongful acts set forth herein in order to disrupt or induce a breach of the NUSCO contract. Defendants knew that their acts were substantially certain to disrupt or induce a breach of the NUSCO contract.

105. The NUSCO contract was actually disrupted and/or breached because of Defendants' conduct, and as a direct and proximate result, the Plaintiffs suffered damages in an amount to be proven at trial.

106. The Defendants' intentional interference with the Kurian and NUSCO contracts were and remain fraudulent, oppressive and malicious and were done either with the intent to injure the business of Plaintiffs or with reckless disregard of a high probability that Plaintiffs would be damaged thereby, such that Plaintiffs are entitled to an award of punitive damages from Defendants in an amount appropriate to punish and make an example of Defendants.

WHEREFORE, Plaintiffs pray judgment as hereinafter set forth.

TENTH CAUSE OF ACTION

(Conversion)

(Cancelled Licenses)

107. Plaintiffs incorporate by reference the allegations of all preceding paragraphs as though fully set forth herein.

108. As described above, after many licensed Stations of Defendants "automatically terminated" and the licensed spectrum involved "automatically reverted" exclusively to the Plaintiffs' Geographic Licenses, Defendants retained control of and dominion over said Plaintiff spectrum, applied said spectrum to Defendants' own uses, for profit, business opportunities, and other consideration, and caused actual blocking interference of Plaintiffs' ownership and right of possession and use of said licensed spectrum. By such action, Defendants converted part of Plaintiffs' FCC licenses: the parts constituted by said retained spectrum. Said conversion and use of Plaintiffs' licenses continues to this time.

109. Defendants conversion actions were undertaken by fraud and deceit, and in violation of Federal law, referenced above. Defendant's conversion actions were and remain fraudulent, oppressive and malicious and were done either with the intent to deplete and otherwise injure the business and viability of Plaintiffs or with reckless disregard of a high probability that Plaintiffs would be depleted or injured. Thus, Plaintiffs are entitled to an award of punitive damages from Defendants in an amount appropriate to punish and make an example of Defendants. WHEREFORE, Plaintiffs prays judgment as hereinafter set forth.

WHEREFORE, Plaintiffs pray for judgment as hereinafter set forth.

ELEVENTH CAUSE OF ACTION

(Conversion)

(Challenged Licenses -- Ongoing)

110. Plaintiffs incorporate by reference the allegations of all preceding paragraphs as though fully set forth herein.

111. As described above, after many licensed Stations of Defendants "automatically terminated" and the licensed spectrum involved "automatically reverted" exclusively to the Plaintiffs' Geographic Licenses, Defendants retained control of and dominion over said Plaintiff spectrum, applied said spectrum to Defendants' own uses, for profit, business opportunities, and other consideration, and caused actual blocking interference of Plaintiffs' ownership and right of possession and use of said licensed spectrum. By such action, Defendants converted part of Plaintiffs' FCC licenses: the parts constituted by said retained spectrum. Said conversion and use of Plaintiffs' licenses continues to this time.

112. Defendants conversion actions were undertaken by fraud and deceit, and in violation of Federal law, referenced above. Defendant's conversion actions were and remain fraudulent, oppressive and malicious and were done either with the intent to deplete and otherwise injure the business and viability of Plaintiffs or with reckless disregard of a high probability that Plaintiffs would be depleted or injured. Thus, Plaintiffs are entitled to an award of punitive damages from Defendants in an amount appropriate to punish and make an example of Defendants. WHEREFORE, Plaintiffs prays judgment as hereinafter set forth.

WHEREFORE, Plaintiffs prays for judgment as follows:

1. On the First Cause of Action:

a. For three times the amount of Plaintiffs' damages;

b. For preliminary and/or permanent injunctive relief;

c. For prejudgment and post judgment interest as permitted by law;

d. For an award of reasonable attorneys' fees in prosecuting the action; and

e. For such other and further relief as the Court may deem proper.

2. On the Second Cause of Action:

a. For general and special damages according to proof;

b. For punitive damages;

c. For prejudgment and post judgment interest as permitted by law; and

d. For such other and further relief as the Court may deem proper.

3. On the Third Cause of Action:

a. For general and special damages according to proof;

b. For punitive damages;

c. For prejudgment and post judgment interest as permitted by law; and

d. For such other and further relief as the Court may deem proper.

4. On the Fourth Cause of Action:

a. For general and special damages according to proof;

b. For punitive damages;

c. For prejudgment and post judgment interest as permitted by law; and

d. For such other and further relief as the Court may deem proper.

5. On the Fifth Cause of Action:

a. For preliminary and/or permanent injunctive relief;

b. For an order requiring Defendants to disgorge all profits obtain through their 5 unfair business practices;

c. For an award of reasonable attorneys' fees in prosecuting the action as permitted by law; and

d. For such other and further relief as the Court may deem proper.

6. On the Sixth Cause of Action:

a. For general and special damages according to proof;

b. For punitive damages;

c. For prejudgment and post judgment interest as permitted by law; and

d. For such other and further relief as the Court may deem proper.

7. On the Seventh Cause of Action:

a. For preliminary and/or permanent injunctive relief;

b. For an order requiring Defendants to disgorge all profits, business opportunities and other consideration obtain through their conversion, or if greater, the fair value of the property converted according to proof;

c. For damages for the proximate and foreseeable loss resulting from Defendants' conversion, according to proof;

d. For general and special damages according to proof;

e. For punitive damages;

f. For prejudgment and post judgment interest as permitted by law;

g. For an award of reasonable attorneys' fees in prosecuting the action as permitted by law; and

h. For such other and further relief as the Court may deem proper.

8. On the Eighth Cause of Action:

a. For general and special damages according to proof;

b. For punitive damages;

c. For prejudgment and post judgment interest as permitted by law; and

d. For such other and further relief as the Court may deem proper.

9. On the Ninth Cause of Action:

a. For general and special damages according to proof;

b. For punitive damages;

c. For prejudgment and post judgment interest as permitted by law; and

d. For such other and further relief as the Court may deem proper.

10. On the Tenth Cause of Action:

a. For general and special damages according to proof;

b. For punitive damages;

c. For prejudgment and post judgment interest as permitted by law; and

d. For such other and further relief as the Court may deem proper.

11. On the Eleventh Cause of Action:

a. For general and special damages according to proof;

b. For punitive damages;

c. For prejudgment and post judgment interest as permitted by law; and

d. For such other and further relief as the Court may deem proper.

Dated: March 18, 2008

By: /s/ PATRICK J. RICHARD
Patrick J. Richard
Nossaman LLP
Attorneys for Plaintiffs
WARREN C. HAVENS, TELESAUUS VPC, LLC, AMTS CONSORTIUM, LLC, INTELLIGENT TRANSPORTATION & MONTORING WIRELESS LLC, and TELESAURUS HOLDINGS GB LLC

App. 162

Case No. A122489

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION ONE

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WARREN HAVENS, TELESAURUS VPC, LLC, AMTS CONSORTIUM, LLC, INTELLIGENT TRANSPORTATION & MONITORING WIRELESS, LLC, AND TELESAURUS HOLDING GB, LLC,

*Plaintiffs and Appellants,*

vs.

MOBEX NETWORK SERVICES LLC, MARITIME COMMUNICATIONS/LAND MOBILE, LLC, AND PAGING SYSTEMS, INC.

*Defendants and Respondents.*

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# APPELLANTS' OPENING BRIEF

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**APPELLANT'S CERTIFICATE OF INTERESTED ENTITIES OR PERSONS**

As required by Rule 8.208 of the California Rules of Court, Appellants Warren Havens, Telesaurus VPC, LLC, AMTS Consortium, LLC, Intelligent Transportation & Monitoring Wireless LLC, and Telesaurus Holdings GB, LLC., certify to the Court that the undersigned is not aware of any interested entity.

Dated: December 22, 2008

By: /s/ PATRICK J. RICHARD
Patrick J. Richard
Nossaman LLP

Attorneys for Appellants
WARREN C. HAVENS, TELESAUUS VPC, LLC, AMTS CONSORTIUM, LLC, INTELLIGENT TRANSPORTATION & MONTORING WIRELESS LLC, and TELESAURUS HOLDINGS GB LLC

## I. INTRODUCTION

The Appellants in this case (Plaintiffs below) brought an action under state law to recover damages caused by Respondents' (Defendants below) unfair business practices. Defendants demurred, arguing that plaintiffs' lawsuit was preempted by federal telecommunications law. The trial court agreed, and dismissed the action, based on a gross misinterpretation of federal preemption: The courts have held unequivocally that the law of federal preemption does not provide a shield to those who violate state laws prohibiting unfair business practices.

The Federal Preemption clause relied upon requires State action that "directly treads upon" an FCC decision concerning entering into the wireless communications markets or setting rates. The SAC in no way treads upon or "second-guesses" any FCC decision. Indeed, the SAC ***relies*** upon the fact of an FCC audit regarding the automatic termination of certain key operating licenses. The Trial Court erroneously applied a Federal preemption under 47 U.S.C. § 332 of the Federal Communications Act ("FCA") -- a very limited preemption provision with no application here -- to deprive Plaintiffs of meritorious claims.

The Trial Court's ruling also ignores the FCA's express Savings Clause and well-established rulings on preemption from the Federal Communications Commission ("FCC") itself. The Trial Court ignored this law to require dismissal unless Plaintiffs could allege that the FCC had made a prior finding of "wrongfulness" regarding Respondents' conduct. By imposing this additional

requirement, the Trial Court in effect adopted Respondents' erroneous contention that Appellants needed to demonstrate that the FCA "created a private of action." That doctrine, urged by Respondents, simply has no relevance or application to Appellants' claims. Accordingly, the lower court's ruling must be overturned; Petitioners have stated meritorious claims under state law that do not tread upon the FCC's role in setting the criteria for market entry.

## II. STATEMENT OF FACTS

### A. The Parties And The Origin Of This Lawsuit

Since 1988, Plaintiff/Petitioner Warren Havens' principal occupation has been obtaining licenses, including licenses in the Automated Marine Telecommunications Services ("AMTS") frequency spectrum, issued by the Federal Communications Commission ("FCC"), and developing businesses based on new wireless communications services for government entities, critical infrastructure companies, and others. (SAC, ¶ 1; [Vol. 6, AA01121].)[1] His companies include the other Plaintiffs/Appellants in this case, Telesaurus VPC, LLC, AMTS Consortium LLC, Intelligent Transportation & Monitoring Wireless LLC, and Telesaurus Holdings GB LLC (together, "Appellants"). Together, Appellants have cooperated over the years to obtain and use their FCC licenses principally for providing new, advanced, wireless services essential for "Intelligent Transportation

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1 "AA" refers to Appellants' Appendix.

Systems" ("ITS") as defined and supported by the US Department of Transportation, the California Department of Transportation, and other agencies of the State of California, the FCC, and other federal and State agencies. (SAC, ¶ 32; [Vol. 6, AA01109].) Appellants are pursuing a cooperative wireless business plan for the ITS market under a research contract with the University of California, a publicly funded institution. (SAC, ¶ 33; [Vol. 6, AA01110].) In addition, Appellants and their interest owners also have executed charitable contributions, under agreements, and pledges for future contribution agreements, to nonprofit corporations. (*Id.*) In short, Appellants are using their FCC licenses for promoting the public good and public access to ITS.

The Defendants/Respondents in this case are Appellants' competitors, Mobex Network Services, LLC ("Mobex") and the companies Mobex acquired over the past few years, Regionet Wireless License LLC, and Waterway Communications; Maritime Communications/Land Mobile, LLC (together with Mobex and its acquired entities, the "Mobex Respondents"); and Paging Systems, Inc. ("PSI") (together with the "Mobex Respondents," "Respondents").

Over the past few years, Respondents have interfered substantially with Appellants' business. They have, for example, made specific misrepresentations to individuals and entities under contract with plaintiffs, interfering with these contracts, including the Kurian contract and a contract with Northeast Utility Service Company ("NUSCO"). (SAC, ¶ 34; [Vol. 6, AA01110-11].)

Respondents have also repeatedly violated the laws of the various states in which they operate, in order to unfairly compete with Appellants and others. For example, Respondent Mobex has failed to register in States, including but not limited to New York, Texas, Illinois and California, as an out-of-state legal entity to do business in the States, a threshold requirement for operating certain stations in those States; it has failed to collect from its alleged customers and submitted in required state filings surcharges and other tax which states require of commercial wireless (including AMTS) station operators; it has failed to file income tax returns and pay other filing fees required by those States; and it has failed to obtain and maintain required legal access to physical antenna structures and other facilities required for actual construction and operation of certain other stations. (SAC, ¶ 11; [Vol. 6, AA01105].) Respondent PSI has committed similar violations, and specifically failed to meet State law filing, tax, and real estate property-access requirements for States in which it purports to own and operate stations. (SAC, ¶ 13; [Vol. 6, AA01106].) These acts and others like them have caused Respondents to accrue an unfair business advantage over Appellants by reducing costs of doing business in an illegal and unfair manner.

In addition, certain FCC rules require that when a site-based AMTS license is issued, the required component stations must be "constructed," and operations actually commenced, within two (2) years of obtaining the license. (SAC, ¶ 38; [Vol. 6, AA01112-14].) If a licensee fails to construct a station within the construction period, the license for

the station terminates automatically without any required action on the part of the FCC. (*Id.*) Assuming a license terminates automatically, the holder of the former licenses is required to notify the FCC of the termination for cancellation. (*Id.*) If not, spectrum hoarding and warehousing can occur, meaning that entities may pretend to own and operate licenses that have terminated for the purpose of preventing competitors from doing so. Spectrum hoarding and warehousing is against the public interest purpose of wireless licensing and license applications under the FCA, FCC Rules, and other laws. (SAC, ¶ 41; [Vol. 6, AA01115].)

Despite the clear automatic termination requirements and prohibition on spectrum hoarding and warehousing, Respondents have hoarded and warehoused licenses that have automatically terminated by failing to construct stations within the applicable periods, and thereafter not surrendering the license to the FCC for cancellation as required under FCC Rules. (SAC, ¶¶ 40-42; [Vol. 6, AA01114-1115].) Similarly, Respondents falsely reported to the FCC that their terminated stations were properly and timely constructed to avoid FCC cancellation but eventually, the FCC conducted an audit of Respondents' station license in which it determined that Respondents had failed to construct a major percentage of the component stations within the applicable time period. (SAC, ¶ 42; [Vol. 6, AA01115].)

Finally, Respondents have acted in concert with each other to willfully restrain competition and trade in Intelligent Transportation Systems (or "ITS"), a new wireless market in the United States.

(SAC, ¶ 32; [Vol. 6, AA01109].) These actions and others have given Respondents unfair and competitive business advantages over Appellants in the wireless market, and they form the basis of Petitioners' action.

**B. Procedural History**

Appellants filed their first Complaint for interference with prospective economic advantage, unfair competition, and other California State law claims on June 22, 2007. (Vol. 1, AA00001-24.) Thereafter, on October 5, 2007, the Mobex Respondents filed their first demurrer (Vol. 1, AA00025-44.) and the PSI Respondents filed an anti-SLAPP motion pursuant to Code of Civil Procedure § 425.16. (Vol. 1, AA00071-89.)

Importantly, in their anti-SLAPP motion, the PSI Respondents argued that the Court ought to obtain or issue a stay in light of ongoing FCC proceedings. (*Id.*) Ultimately, however, the request for a stay was immaterial because the trial judge denied the PSI Respondents' anti-SLAPP motion, finding that Appellant's allegations did not rely on protected communications or Respondents' filings with the FCC. (Vol. 5, AA00867-874.)

There was no ruling on Respondent's demurrers, however, because Appellants voluntarily filed a First Amended Complaint ("FAC") on November 5, 2007. (Vol. 5, AA 00804-834.) On December 21, 2007, Respondents filed demurrers to the FAC. (Vol. 5, AA00875-925.) On February 11, 2008, the lower Court, in effect applying an exhaustion of administrative remedies requirement, sustained the demurrer with leave to amend to allege facts sufficient to show that, with regard to

specific identified licenses, the FCC "has *finally determined* that [Respondents]. . . wrongfully retained cancelled licenses." (Vol. 6, AA01087-1088 pages 2:26-3:1 [emphasis added].)

With this directive in mind, Appellants filed their SAC on March 19, 2008, and separated out the "cancelled" or automatically terminated licenses from those that were still the subject of ongoing FCC proceedings (referred to in the SAC as "Challenged Licenses – Ongoing").[2] (*See, e.g.*, SAC, ¶¶ 18-19; [Vol. 6, AA01107].) Appellants' SAC did not add any new causes of action. Rather, the SAC made different changes that are important here. First, the SAC split up the causes of action for various torts already existing in the FAC, such as interference with contracts and conversion, into two separate sets of actions: One cause of action for each tort pertaining to the Challenged Licenses – Ongoing,

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2 The term "Cancelled Licenses" refers to those licenses formerly held by Respondents that automatically terminated and were subsequently identified by the FCC as cancelled. (SAC, ¶¶ 18, 28, Vol. 6, AA01107-01108); Exhibit A to the SAC provides a list of these licenses. Vol. 6, AA01142-1144.) These licenses are already the subject of final determinations by the FCC and are no longer subject to any appeal or right of appeal. (SAC, ¶ 28, Vol. 6, AA01108.) "Challenged Licenses -- Ongoing" refers to those licenses that Defendants failed to develop or that should be otherwise revoked and/or had automatically terminated, and that are subject to ongoing administrative proceedings before the FCC. (SAC, ¶¶ 19, 29; Exhibit B to the SAC provides a list of these licenses.) Although "challenged" licenses have not been subject to any fact finding hearings by the FCC, the FCC routinely permits reconsideration upon discover of new evidence, such as that gathered in State Court proceedings. (SAC, ¶ 29, Vol. 6, AA01108-01109.)

and one cause of action for the cancelled licenses for which the revocation of respondents' FCC licenses was final. (*See, e.g.*, SAC, ¶¶ 107-112; [Vol. 6, AA01137-1138].) For example, there are two fraud claims, one for fraud pertaining to Challenged Licenses – Ongoing, and one concerning cancelled licenses. (SAC, ¶¶ 68-83; [Vol. 6, AA01121-134].) Second, the allegations in the SAC are much more specific than those in the FAC. Again, using the claim for fraud as an example, the SAC alleges in detail that both Mobex and PSI submitted license renewal applications for stations that were never constructed, and had automatically terminated and thereby fraudulently caused Appellants to believe that licenses were not available in those markets. (SAC, ¶¶ 68-76; [Vol. 6, AA01127-1133].) Similarly, new allegations were added to Appellants' Cartwright Act claims for the cancelled and ongoing licenses. Specifically, Appellants allege that Respondents Mobex and PSI violated the Cartwright Act in part because they failed to meet State law filing, tax, and real-estate property-access requirements for States in which they purport to own and operate AMTS CMRS Stations under the Ongoing Licenses previously cancelled by the FCC. (*See, e.g.*, SAC, ¶¶ 13; 50-53; [Vol. 6, AA01106, 01119-21].) These specific allegations were not in the FAC; but the causes of action were.

All of these acts, it is alleged, gives Respondents an unfair advantage over Appellants in business, among other things, and caused Appellants to wrongly lose business opportunities. (SAC, ¶¶ 91-93; 56-60; 51-52; [Vol. 6, AA01135-36; 01121-1124; 1119-1120].)

### C. The Demurrers To The SAC

On April 16, 2008 Respondent PSI filed its demurrer to the SAC (Vol. 6, AA01152-1253); and Respondent Mobex followed suit two days later (Vol. 7, AA01254-1280.) The grounds for the demurrers were very similar: both Respondents argued that the FCA preempts all of the causes of action in the SAC, and that the claims at issue were pled improperly. (Mobex Mem. at pp. 4-14, [Vol. 7, AA01268-1278]; PSI Mem. at pp. 3-8, [Vol. 6, AA01163-1168].)

On May 12, 2008, the Superior Court held a hearing (Vol. 9, AA01952-1986) and ultimately sustained the general demurrer to the SAC and to each and every one of Appellants' 11 causes of action. (Vol. 9, AA01987-1997.) Specifically, the Court sustained Respondents' demurrers on the grounds that all of Appellants' claims fell "within the express preemption clause of the Federal Communications Act (FCA)." (Vol. 9, AA02089-91.) According to the Court, "[a]djudication of" *all* "the state claims pled in the SAC would necessarily implicate the regulation of "entry" into the mobile service market," per *TPS Utilicom Services, Inc. v. AT&T Corp.* (C.D. Cal. 2002) 223 F. Supp. 2d 1089. (3:5-8, Vol. 9, AA02089.) The Court concluded that, absent further administrative findings of liability, it lacked jurisdiction. (*Id.*, at 3:21-27, Vol. 9, AA02089.)

In so holding, the Court explained that it mattered not whether the allegations supporting the various claims were based on allegations other than those even relating to or touching upon the FCC or the FCA. For example, with respect to the antitrust claim, the Court ignored the allegations that

Respondents failed to pay their state taxes and other fees, and held that the claim was preempted because the "underlying wrong" was hoarding licenses – and this is "something that the FCC should be determining." (5/12/08 Tr. at 55:11-19, 56:9-17, 60:9-16 [Vol. 9, AA01979-1980, 1984].) The Court further explained its ruling by stating that the "new allegations that were added," such as the alleged violations of state tax laws and other fees, could not be "connected to the thrust of the wrong being alleged here," and that it was not clear "how" the state law claims were "*related to the gist of the wrong being alleged in this action*." (5/12/08 Tr. at 36:19-21; 37:5-8, [Vol. 9, AA01960-61]; [emphasis added].) Rather, the state law claims, and the new facts alleged therein, were "just allegations thrown in to try to get around the defect" pointed out at the last hearing – the fact that the FCC had not yet made final determinations of certain licenses. (5/12/08 Tr. at 36:17-23, [Vol. 9, AA01961].)

Although Appellants' counsel pointed out that application of a "thrust" or "gist" of the complaint standard as applied to demurrers was inappropriate under California law, the Court nevertheless sustained the demurrer:

> The violations of state law, . . . I looked and I read a couple times your second amended complaint. Those are new allegations that were added, and I could not connect those allegations to the thrust of the wrong being alleged here. They, quite frankly, appear to me to just be allegations thrown in to try to get around the

> defect that I pointed out at the last hearing.
>
> But it's clear to me in reading the second amended complaint, as it was from reading the first amended complaint, that the **thrust and gist of this action is alleged state law claims based upon licenses that automatically terminated and were wrongfully retained so as to warehouse licenses and hoard spectrum. . . . So I didn't ignore the violations of state law. I just couldn't see from reading the complaint how they were related to the gist of the wrong being alleged in this action.** (5/12/08 Tr. at 36:17-37:8, [Vol. 9, AA01960-61].) [Emphasis added.]

The Trial Court did not identify any allegations of the SAC that it concluded directly tread upon or second-guessed an FCC decision. Indeed, the Trial Court applied a broader standard akin to "subject matter" preemption to disregard both the specific allegations and actual legal standard under Section 332.

As set forth below, the Court's ruling is erroneous. The Court ignored the allegations in the SAC concerning cancelled licenses because the SAC did allege that the FCC determined violations of law requiring automatic termination; and the Court failed to properly analyze the preemption doctrine.

Moreover, the Court applied an erroneous standard of review to a demurrer. The Court sustained the demurrer without leave to amend because the SAC generally concerns FCC licenses, without regard to whether it is preempted by the narrow statutory language of Section 332. Accordingly, the ruling should be overturned, and Appellants should be allowed to go forward on all claims.

## III. ARGUMENT

### A. Standard of Review

"A demurrer tests the legal sufficiency of the complaint. Therefore, . . . [appellate courts] review the complaint *de novo* to determine whether it contains sufficient facts to state a cause of action." (*Grinzi v. San Diego Hospice Corp.* (2004) 120 Cal. App. 4th 72, 78 [italic added].) A "trial court commits reversible error when it sustains a demurrer without leave to amend" if facts were alleged "showing entitlement to relief under any possible legal theory." (*Platt v. Coldwell Banker Residential Real Estate Servs.* (1990) 217 Cal. App. 3d 1439, 1444; *Ball v. GTE Mobilenet of California* (2000) 81 Cal. App. 4th 529, 534-535 [applying these standards in context of Section 332 preemption claim].) The reason for this standard is simple: "[T]he allegations of the complaint must be liberally construed with a view to attaining substantial justice among the parties." (*Biles v. Richter* (1988) 206 Cal. App. 3d 325, 329 [citation omitted].) Unless no theory of relief can be stated, a litigant should not be denied his day in court. (*Terhell v. Am. Commonwealth Assocs.* (1985) 172 Cal. App. 3d 434, 441.)

"On appeal, in assessing the sufficiency of a pleading against a demurrer, all material facts properly pleaded and those which arise by reasonable implication therefrom are deemed true." (*Platt, supra*, 217 Cal. App. 3d at 1444; *Terhell, supra*, 172 Cal. App. 3d at 438.) Courts also consider true those "matters which may be judicially noticed[;]" but not "contentions, deductions or conclusions of fact or law." (*Evans v. City of Berkeley* (2006) 38 Cal. 4th 1, 6.)

Here, the trial court sustained the demurrer to the SAC without leave to amend; and the case was dismissed. Accordingly, the standard of review in this case is *de novo*. *De novo* review makes one thing crystal clear: the Trial Court's "gist" of the complaint standard lead to an erroneous decision and a miscarriage of justice. By applying the wrong standard of review to a demurrer, the trial court failed to recognize that the facts as pleaded in the SAC state causes of action under State law. The FCA does not preempt or preclude any of Appellants' state law claims concerning cancelled licenses. Finally, the law makes it clear that the proper course of action with respect to the ongoing licenses is to stay the case, or bifurcate the cancelled license claims from the Challenged Licenses – Ongoing claims, but it is improper to dismiss the SAC in its entirety. The lower Court's decision should therefore be reviewed *de novo* and reversed.

**B. The Demurrer Was Improperly Sustained Because The Court Applied An Erroneous "Gist Of The Complaint" Standard Instead Of**

**The "Any Possible Theory" Standard**

The Court below sustained Mobex's and PSI's demurrers to the SAC without leave to amend as to each of the eleven causes of action, finding that *all* of "the claims set forth in the SAC come within the express preemption clause of the" FCA. (6/2/08 Order at 3:1-5; 4:12-16 [Vol. 9, AA01989-1990].) This ruling is contrary to law, and it ignores the allegations in the SAC.

Instead of "determin[ing] whether there is a reasonable possibility that a cause of action can be stated," the trial court applied an erroneous "gist of the complaint" standard to improperly sustain the demurrer. At the May 12, 2008 hearing, the Court explained that although it could not "connect" the "violations of state law" or any of the state law violations "to the thrust of the wrong being alleged here," still, the "*thrust and the gist of this action* is alleged state law claims based upon licenses that automatically terminated and were wrongfully retained so as to warehouse licenses and hoard spectrum." (5/12/08 Tr. at 36:17-37:3, [Vol. 9, A01960-61; [emphasis added].) There is no standard in California law that applies the "gist of the complaint" or "thrust" of the action language to determine whether a complaint withstands a demurrer. Rather, a demurrer cannot be used to dismiss of an entire action unless there are no facts "showing entitlement to relief under *any possible legal theory*." (*Platt, supra,* 217 Cal. App. 3d at 1444 [emphasis added].)

For example, in *Terhell, supra,* the appellate court reversed the trial court's ruling sustaining a

demurrer and dismissing the action because the Court incorrectly applied a limited immunity to every claim. (172 Cal App 3d 434.) In *Terhell,* a firefighter was damaged in a fall through a roof sustained while putting out a fire. The firefighter sued the owners of the building, alleging that they had failed to warn of a concealed opening in the roof, through which he ultimately fell. (*Id.*, at 437-438.) The defendants argued that the entire lawsuit was barred by the "firefighter's rule," which states that a "firefighter who is injured fighting a fire is barred from bringing a tort action against a person for causing the fire." (*Id.* at p. 438.) The appellate court reversed because the facts supported an additional theory of relief: The failure to warn of a hidden, known danger gives rise to a cause of action in tort not barred by the firefighter's rule. (*Id.*)

Instead of applying the "any possible theory" standard or even considering express factual allegations to determine the complaint's viability, the Court below did the opposite. (*See*, 5/12/08 Tr. at 36-39, [Vol. 9, AA01960-63].) In fact, the Court made no attempt to determine at all whether the SAC stated any cause of action or look at the particularized allegations. Rather, the Court simply decided that the whole case related to FCC administrative decisions as to "market entry" and that all of the causes of action were precluded as a result. (*Id.*) This alone is reversible error. (*Terhell, supra*; *Platt*, *supra*, 217 Cal. App. 3d at 1444.) But as set forth *infra*, there is more: The Court committed reversible error because the SAC does not challenge FCC decisions and does not seek

reconsideration of any FCC decision; there is therefore no preemption under the FCA.

### C. The Lower Court's Ruling Is Contrary To Well-Established Law On Preemption

Respondents argued below that Appellants' claims – those relying on finally determined, cancelled licenses and those related to ongoing licenses – were preempted because they "fall under the FCC's *express* statutory purview." (PSI Mem. at 5:11 [Vol. 6, AA01165]; [emphasis added]; *see, also,* Mobex Mem. at 4:26-5:5 [Vol. 7, AA01268].) This argument was little more than an invitation to the lower Court to commit reversible error which, unfortunately, was accepted. Specifically, the Court held that the entire complaint was barred by 47 U.S.C. § 332(c)(3)(A), the FCA preemption clause, finding that "entry into the market . . . is broad enough" to encompass the action complained of here -- warehousing and hoarding licenses. (5/12/08 Tr. at 47:12-15, [Vol. 9, AA01971].)[3] The Trial Court further explained that the "problem" with the entire SAC "is that the damage award that you want to get in this State Court is predicated upon a finding of wrongful retention of licenses, and in my opinion the FCC has to determine that. . ." (5/12/08 Tr. at 47:18-21[Vol. 9, AA01971].)

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[3] The "'stockpiling or warehousing of spectrum by licensees,'" and the converse promotion of competition and investment, were express concerns that caused Congress to adopt "minimum construction requirements." (47 U.S.C. § 309(j)(4)(B), *Melcher v. FCC* (1998) 134 F.3d 1143, 1162.)

The underlying premise of the Court's entire ruling – that section 332 bars claims relating to the hoarding of FCC licenses that had automatically terminated – is wrong. The Court's ruling finds no support in the language or purpose of the statute, is contrary to the case law, and improperly disregards the FCC's own decisions -- decisions intended to provide guidance to courts. There is no preemption under the FCA as a matter of law, for several reasons.

**1) The FCA Only Preempts Claims That Directly Regulate Rates And Market Entry**

Section 332(c)(3) provides in part that "no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services." (47 U.S.C. § 332(c)(3) [emphasis added].)

"The preemption doctrine originates from the Supremacy Clause in the United States Constitution." (*Cooperative Communications, Inc. v. AT&T Corp.* (D. Utah 1994) 867 F. Supp. 1511, 1514; U.S. Const. art. VI, cl. 2.) "Under the Supremacy Clause, 'state laws which interfere with, or are contrary to the laws of Congress, made in pursuance of the Constitution, are invalid.'" (*Cooperative Communications, supra,* 867 F. Supp. at 1514.)

> "The primary inquiry in all preemption cases is the objective or purpose of Congress in enacting the

> particular statute. Congressional intent may be expressly stated in the language of the statute, or may be implied by the structure and purpose of the statute. Absent an express congressional statement [of intent to preempt state law], state law may be preempted in two situations: first, if the state law actually conflicts with federal law; or second, if federal law so thoroughly occupies a legislative field 'as to make reasonable the inference that Congress left no room for the States to supplement it.'" (*Id.* at 1515 [citations omitted].)

The Supreme Court has recently confirmed that Federal preemption of state law claims must be narrowly construed:

> "When addressing questions of express or implied pre-emption, we begin our analysis 'with the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" (*Altria Group, Inc. v. Good*, 2008 U.S. LEXIS 9127, *11; *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).)

Put differently, there is a "presumption against preemption." (*Spielholz v. Superior Court* (2001) 86 Cal. App. 4th 1366, 1372.) Thus, the scope of any particular federal preemption clause turns on the language in the statute. (*Altria Group, Inc., supra,* at *10.) The Airline Deregulation Act (49 U.S.C.A. § 41713(b)(1) ), for example, contains statutory language of "unusual breadth" because it prohibits states from enacting or enforcing any law "'*relating* to rates, routes or services of any air carrier.'" (*Id.*, at *25-26 [emphasis added].) "The phrase 'relating to' has a broader scope than the preemption the Federal Cigarette Labeling and Advertising Act's clauses found in other federal legislation such as which preempts a more narrow scope of state activity and confines preemption to rules 'based on' smoking and health." (*Id.*, at *26.)

Section 332(c) unquestionably also has a narrow preemption clause, intended only to preempt local "regulation" of market entry and rates; the statute does not even refer to lawsuits or private party disputes; most telling, Section 332 does not use the broad language of "any law relating to" commercial mobile carriers; only two specific and limited areas are preempted, as in *Altria Group, Inc.*, while regulation of all other terms is left to the States.

*Altria Group, Inc.* also clarified that claims brought under a state's Unfair Trade Practices Act are not preempted under the Federal Cigarette Labeling and Advertising Act because statutory interpretation generally "disfavors preemption." (*Altria Group, Inc. v. Good*, *supra*, at *11 (citing *Bates v. Dow Agroscience, LLC* (2005) 544 U.S. 431,

449.) The Supreme Court's recent decision in *Altria Group, Inc.*, rejecting Federal preemption of state law claims, is entirely consistent with decisions interpreting Section 332(c): There is generally no preemption of state law claims, except for those limited claims that specifically directly intrude upon the FCC's authority to regulate market entry and rate-setting. Any broader reading of Section 332 ignores the limited language Congress chose and does not serve the purpose of the statute, which "is the ultimate touchstone of every preemption case." (*Medtronic, Inc. v. Lohr* (1996) 518 U.S. 470, 485; *Altria Group, Inc., supra,* 2008 U.S. LEXIS 9127 at *10.)

The purpose of the preemption clause in Section 332 is "to achieve nationwide uniformity in telecommunications regulation." (*Bastien v. AT&T Wireless Svcs., Inc.* (7th Cir. 2000) 205 F.3d 983, 988-989; *see also Moriconi v. AT&T Wireless PCS, LLC* (E.D. Ark. 2003) 280 F. Supp. 2d 867, 875.) And, "[t]he express purpose of" the FCA "is to 'regulate interstate and foreign commerce in communication by wire and radio so as to make available . . . to all the people of the United States a rapid, efficient communication service with adequate facilities at reasonable charges.'" (*Cooperative Communications, supra,* 867 F. Supp. at 1515, *quoting* 47 U.S.C. § 151.) This purpose in no way conflicts with the distinct duties imposed on competitors under state law. (*See, Altria Group, Inc., supra*, 2008 U.S. LEXIS 9127 at 10.) Therefore, and in accordance with the statement of Congressional intent found in Section 151 and the overall purpose of the preemption clause, only state law claims in "direct"

conflict with FCC regulation are preempted by the FCA. (*See*, 47 U.S.C. §§ 152(b)(1); 414; *Moriconi*, *supra*, 280 F. Supp. 2d at 872; *Spielholz*, *supra*, 86 Cal. App. 4th at 1374 ["Section 332(c)(3)(A) does not disclose a congressional intent to preempt state court monetary awards that may require a determination of the value of services provided but do not *directly* regulate rates."].)

As the FCC itself has acknowledged, Section 332 generally does not preempt state law damages claims; rather, whether a specific claim is preempted "will depend on the specific details of the . . . particular case." (*In re Wireless Consumers Alliance, Inc.* (2000) 15 FCC RCD 17021, at p. 17026, ¶ 9.) For example, although Section 332 preempts actual rate-setting, it does not preempt state contract or consumer fraud laws relating to the disclosure of rates and rate practices. (*See*, *Id.*, at p. 17028-29, ¶ 14; *see also*, *Spielholz*, *supra*, at 1374.) With respect to rates, then, the FCC regularly distinguishes "between claims that would enmesh the courts in a determination of the reasonableness of a rate charged and those that would require examination of rates in the context of assessing damages, but would not involve the court in such a reasonableness inquiry." (*Fedor v. Cingular Wireless Corp.* (7th Cir. 2003) 355 F.3d 1069, 1073 [emphasis added].) The former are preempted; the latter are not. (*Id.*)

As set forth above, regulation of rates is not the issue here; indeed, there are no rate allegations in the SAC. Instead, the only issue is whether the SAC – and the individual claims therein – seek to regulate market entry. Therefore, the key questions are what constitutes "market entry" under section

332 – and whether the SAC seeks to regulate "market entry" as that term is defined.

**2) If A Claim Directly Treads Upon Or "Second Guesses" FCC Determinations Concerning The Issuance Of Licenses, It Regulates Market Entry And Falls Within The Exclusive Province Of The FCC**

The Seventh Circuit has provided a clear definition of "market entry" in the context of Section 332: Section 332 only preempts claims that "tread directly on the very areas reserved to the FCC: the modes and conditions under which" telecommunications providers "may begin offering services" within a specific market. (*Fedor*, *supra*, 355 F.3d at 1072 *citing Bastien, supra,* 205 F.3d at 989 [emphasis added]; *see also Spielholz, supra*, 86 Cal. App. 4th at 1374.)[4] As one court has noted, "any challenge to a wireless service provider's

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[4] Applying the U.S. Supreme Court's admonition in *Altria Group, Inc.*, to construe narrowly words in a preemption statute, the plain language of the statute suggests that Congress intended to preempt only legislative efforts because Section 332 only prohibits state and local authority "to regulate." (*Altria Group, Inc., supra,* at *14.) Appellants do not rely on, and Respondents do not purport to challenge, any local ordinance or state statute setting market entry criteria for mobile service providers, or any of their service rates. This Court need not decide whether Section 332's reliance on the words "to regulate" was intended to preempt only intrusive legislative efforts, however, and not lawsuits, because there is no Federal preemption of the claims here under existing authority.

practice is successful, is likely to impact rates and the manner in which services are delivered, but its indirect result does not convey such challenges into a direct challenge to rates and market entry contemplated by the preemptive language of the statute." Put differently, a claim that requires a court to "second guess[]" the reasonableness of an FCC determination concerning market entry will be preempted. (*TPS Utilicom Servs. Inc. v. AT&T Corp.* (C.D. Cal. 2002) 223 F. Supp. 2d 1089, 1108; *see, also, Ball, supra,* 81 Cal. App. 4th at pp. 808-809 [holding claims that alleged overcharges for services were precluded because they "directly challenged" the rates charged; but that claims alleging inadequate disclosure of other charges under wireless telephone contracts sufficiently stated a cause of action that was not preempted because they were unfair business practices].)

For example, in *Bastien,* the appellate court considered whether a complaint alleging that AT&T Wireless breached its contract to its customers by signing up customers without first building adequate infrastructure such as cellular towers. (*Bastien, supra,* 205 F.3d at 989.) The Seventh Circuit held that these claims "tread directly on the very areas reserved to the FCC: the modes and conditions under which AT&T Wireless may begin offering service" in that particular market. (*Id.* at 989.) In so doing, the Court pointed to *specific allegations* in the complaint that conflicted with FCC criteria for market entry, including allegations that AT&T had "signed up subscribers without first building the cellular towers and other infrastructure necessary to provide reliable cellular connections." (*Id.*)

By contrast, in *Fedor,* the plaintiff alleged that delayed charges by Cingular showed up on his bills during improper months, making his monthly charges inaccurate. (*Fedor v. Cingular Wireless Corp.* (7th Cir. 2003) 355 F.3d 1069, 1070-1071.) Cingular argued that the plaintiffs' complaint was barred by Section 332's preclusion of claims concerning market entry because, if successful, the plaintiff's claims would "necessarily require" Cingular to alter its infrastructure by building cellular towers in areas that it did not already have them. (*Id.*, at 1074.) This kind of fundamental change in Cingular's infrastructure would impact Cingular's (and presumably others') actual, physical entry into the telecommunications market. (*Id.*) The Seventh Circuit disagreed, however, holding that this stretched the allegations in the complaint "beyond recognition." (*Id.*) This was "an accounting problem, not an infrastructure problem," and if the plaintiff succeeded in his claims Cingular would be required only to adjust its accounting practices. (*Id.*) Put differently, the plaintiff's claim did "not relate to the construction or placement of towers at all." (*Id.*) *Fedor* makes it clear that the FCA only preempts state "regulation of rates and market entry," *but not claims affecting other issues* such as improper or fraudulent billing. (*Id.*, at 1071.)

In *Ball, supra,* the California Court of Appeal for the Third Appellate District considered whether causes of action in a complaint that alleged in part that defendants improperly charged or "overcharged" plaintiffs for telephone service were preempted. (*Ball, supra,* 81 Cal. App. 4th at 540.) In finding these causes of action "directly challenged" the rates

charged by defendants, the Court held them to be preempted. (*Id.*) But other causes of action, based on inadequate disclosure or misrepresentation of rates charged, were not preempted because they constituted "other terms and conditions" concerning rates such as "consumer protection matters." (*Id.*, at 543.) According to the *Ball* court, the demurrer could not be sustained with respect to the "consumer protection matters" because section 332's "preemptive power does not apply in this disclosure arena." (*Id., see also, Spielholz, supra*, 86 Cal. App. 4th at 1375-6 [FCA does not "preempt monetary relief for state law causes of action based on false advertising," because a claim for false advertising does not directly challenge rates.])

Finally, in *TPS Utilicom Services Inc. v. AT&T Corporation*, the plaintiff alleged that AT&T, by using a shell company, ANW, entered license auctions that AT&T could not – and that as a result, AT&T was able to buy licenses that the plaintiff would otherwise have bought. (*TPS Utilicom Servs. Inc. v. AT&T Corp.* (C.D. Cal. 2002) 223 F. Supp. 2d 1089, 1096, 1108.) This, in turn, prevented plaintiff from gaining market entry. (*Id* at 1096, 1108.) The trial court agreed with AT&T that this kind of claim was preempted under section 332. The court explained that "[e]ntry into the wireless communications market requires access to the FCC license. The manner by which a party may acquire such a license is determined by the FCC. The express preemption found at 47 U.S.C. § 332(c)(3)(A) prevents second guessing of the FCC auction participation criteria by challenge under state law."

(*Id.*, at 1108 [emphasis added]; 47 U.S.C. § 332(c)(3)(A).)

Thus, under *TPS Utilicom*, if state law claims seek to independently test the competitive bidding process or eligibility for licenses auctions "by different criteria," than those found in the FCA, then they will be preempted. (*TPS Utilicom*, *supra*, 223 F. Supp. 2d at 1108-1109.) This is because Congress authorized the FCC "to develop a competitive bidding process that included 'safeguards to protect the public interest in the use of the spectrum' and to promote the varied purposes of the FCA. The FCC complied with that mandate by publishing regulations governing spectrum auctions. The regulations specify precise eligibility requirements for the auction and bidding at issue here." (*Id.*, at p. 1109 [citations omitted].)

To summarize, claims that directly regulate, "tread upon" the competitive auction bidding process, or attempt to set forth eligibility requirements for obtaining FCC licenses will be preempted. (*Fedor*, *supra.*) So, too, will cases where the court is required to "second guess[]" an FCC licensing determination. (*TPS Utilicom*, *supra.*) But cases with no more than a "tangential relationship" (versus a direct relationship) to market entry survive a demurrer brought on preemption grounds. (*Ball*, *supra*, 81 Cal. App. 4th at 539.)

**3) There Is No Preemption Because The SAC Does Not Intrude Upon The FCC's Regulation Of Market Entry; Nor Does It "Second Guess" FCC**

**Determinations Concerning The Issuance Of Licenses**

Here, the claims in the SAC neither intrude upon an FCC determination of licensing or market entry, nor do the claims "second guess[]" any licensing determinations made by the FCC. There are no allegations in the SAC "second guessing" FCC determinations of whether licenses should have been issued to Respondents in the first place. Rather, the allegations state the opposite: The SAC states that Respondents were granted the licenses years ago and it does not challenge that determination at all! (SAC, ¶¶ 7, 9, 12, 28; [Vol. 6. AA01102-1103; AA01105; AA01108].) In fact, many of the allegations in the SAC are premised on the assumption that licenses originally acquired at FCC auctions later *expired automatically*, and that Respondents wrongfully hoard and warehouse them. (SAC, ¶¶ 28, 36-44; [Vol. 6, AA01108; AA01112-1119].) Put differently, none of these allegations implicate an FCC determination, since the licenses expired "automatically" when Respondents failed to comply with buildout requirements and have become invalid on their own as a matter of law. (47 C.F.R. §§ 1.946, 1.955 and 80.49.) Indeed, the FCC eventually discovered in an audit that these licenses had automatically terminated years ago. Respondents should have reported this to the FCC but they did not. (SAC, ¶ 42-44; [Vol. 6, AA 01115-1117].) Thus, to the extent that the claims at issue are based on "hoarding" cancelled licenses and failing to tell Appellants and others that the licenses should have been up for auction, the claims clearly survive. (SAC, ¶¶ 33-36; [Vol. 6, AA01110-12].)

These basic claims for damages in no way tread upon FCC decision-making authority.

This is the exact opposite of the situation described in *TPS Utilicom* where the parties tried to "second guess[]" FCC determinations concerning auction *participation*. (*See*, *TPS Utilicom*, *supra*, 223 F. Supp. 2d at 1108-1109.) Indeed, it is much like the *Fedor* case, where the allegations of the complaint concerned the defendants' wrongful acts, not FCC action. (*See*, *Fedor*, *supra*, 355 F.3d at 1074.)

Next, the SAC does not contain any claims that attempt to restrict the "modes and conditions" upon which Respondents might begin offering services to customers. One need look no further than the first cause of action for violation of the Cartwright Act, California's anti-trust law, to see this is true. In California, "[c]ombinations entered into for the purpose of restraining competition," or creating a monopoly, "are unlawful" "under the common law ... and the Cartwright Act."[5] (*Messner v. Journeymen Barbers* (1960) 53 Cal. 2d 873, 885-886 [citations omitted].) Respondents' conduct falls within these statutory prohibitions. Respondents violated state laws by, among other things, agreeing not to pay taxes and/or other fees under state law, and by directly discouraging Appellants' customers from consummating transactions with Appellants. Accordingly, Respondents gained an unfair

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[5] As argued to the Trial Court, the FCA expressly preserves anti-trust claims and does not preempt them. (47 U.S.C. § 152(b)(1); *see*, *infra*, Section 7.)

advantage over other competitors such as Appellants, and restrained competition. (SAC, ¶¶ 51(b), (i), 52; [Vol. 6, AA01119-20].) These allegations have nothing at all to do with independently testing the FCC's bidding process, or eligibility for licensing; and none of them intrude on a prior FCC determination as to licensing validity, or otherwise. As such, these allegations are not within the scope of the FCA; and the Cartwright Act claim should not have been dismissed under a preemption theory.

Neither Respondents nor the Trial Court offered any authority or rationale for dismissing claims based on violations state tax and fee requirements, nor is there any. Moreover, neither Respondents nor the Trial Court identified any allegations in the SAC that "directly tread upon" any FCC decision, or otherwise met Section 332's preemption prerequisites.

**4) The Trial Court's Sweeping Interpretation of Section 332's Preemption Disregards the FCC's Own Interpretation Of The Statute's Scope**

Respondents urged the Trial Court to adopt a *per se* preemption standard of Appellants' damages claims, arguing that Appellants sought damages based on Respondents' alleged violation of FCC regulations and/or the FCA. (*See, e.g.*, PSI Reply Br. p. 4; [Vol. 7, AA01465].) The Trial Court appears to have picked up on this, holding that the "thrust and gist of this action is alleged state law claims based upon" licensing determinations, and therefore preempted. (5/12/08 Tr. at 36:17-37:15; [Vol. 9,

AA01960-61].) This holding is erroneous because it disregards the plain reading of FCC decisions concerning the viability of state law damages claims.

"[O]pinions by the FCC are entitled to deference." (*Fedor, supra*, 355 F.3d at p. 1073; *see, also, City of Chicago v. FCC* (7th Cir. 1999) 199 F.3d 424, 429 ["An agency's interpretation of a statute it administers commands deference. . . "].) The FCC itself has made it clear that "Section 332 does not *per se* preempt damage awards in state actions based on contract, tort or consumer protection law." (*In re Wireless Consumers Alliance, Inc.* (2001) 16 FCC R.C.D. 5618, 5619.)

The FCC's order in *Wireless Consumers Alliance, supra,* expressly reflects the Commission's interpretation of Section 332 as applied to state law contract and tort claims. Its decision disposes of the contrary interpretation and presumption of preemption urged by Respondents:

> "Section 332 does not generally preempt the award of monetary damages by state courts based on state consumer protection tort or contract claims.
>
> . . .
>
> [T]he award of monetary damages based on state contract or tort causes of action is not necessarily equivalent to rate regulation and thus is not generally preempted by Section 332. We further conclude that the award of monetary damages in these types of causes of action would generally fall under the terms and

> conditions provisions of Section 332, which can be the subject of state action." (In re Wireless Communications Alliance, Inc., Memorandum and Order, 15 FCC RCD 17021, 17022, 17040 (2000) ["WCA Order"].)

Section 332 does not preempt state regulations of the "terms and conditions of" mobile service, such as consumer protection matters. (*In re Wireless Consumers Alliance*, *supra*, 16 FCC RCD at p. 5620; *Moriconi*, *supra*, 280 F. Supp. 2d at 874, 876 [no preemption unless claims present a "direct challenge" to market entry or rates].) This is in part because "tort and contract law have the additional and separate function of compensating victims, which sets them apart from direct forms of regulation." (WCA Order, *supra*, at p.*17034.)

Only when damages claim intrude upon an area reserved to the FCC will they be precluded; for example, if the state court has to "determine the infrastructure appropriate to market entry" before awarding damages, the claims will be precluded under section 332, which reserves "market entry" determinations to the FCC. (*Fedor*, *supra*, 355 F.3d at p. 1073.)

Here, there are no claims in the SAC that are "necessarily equivalent" to regulation of market entry. (WCA Order, *supra*, at p. 17040.) Any ruling to the contrary ignores the plain language of FCC determinations. None of the claims seek to regulate market entry; for example, none of them seek to force Respondents to build additional infrastructure to support additional wireless markets. Similarly,

none of the claims seek to "second guess" an FCC determination concerning market entry. Rather, the claims at issue seek damages or disgorgement of profits based on Respondents' anti-competitive conduct in the market place, caused in part by hoarding and warehousing expired licenses; they seek damages based on Respondents' direct interference with Appellants' business, including specific, identified contracts (the NUSCO and Kurian contracts), and they seek damages based on other tortious acts committed by Respondents. (SAC, ¶¶ 33-34; SAC pp 39-41 [Vol. 6, AA01110-1111; AA01139-1141].) As set forth below, these kinds of claims are not preempted because they directly compensate Appellants for Respondents' wrongs against them.

**5) There Is No Preemption Under Section 332 Where Claims Are Based on Mixed Allegations**

Even if Respondents had identified particular allegations that directly challenged an area reserved to the FCC -- and they did not -- preemption would only be proper if there were no other basis for the claims. So long as the claim at issue also contains allegations that do *not* fall within the scope of the FCA, the demurrer to the entire complaint cannot be sustained on the preemption ground. As one court has explained, to the extent a plaintiff's unfair competition claim "rests on a challenge to" a mobile carrier's rates, "it is expressly preempted by Section 332." (*Connecticut Mobilecom, Inc. v. Cellco Partnership* (S.D.N.Y. 2003) 2003 U.S. Dist. LEXIS 23063, *19.) But to the extent that the claim is "also premised on allegations" such as stealing customers,

termination of service, defamation or "other terms and conditions" of the mobile carrier's relationship with its customers, "it is not preempted." (*Id; see, also, Ball, supra*, 81 Cal. App. 4th at 540.)

Here, of course, many of the claims in the SAC are based upon violations of State tort laws completely unrelated to hoarding of expired licenses. For example, the interference with contract claim is based on Respondents' actual interference with established contracts, NUSCO and Kurian. (SAC, ¶¶ 33-36; 99-106; [Vol. 6, AA01110-12; 01136-37].) And, the section 17200 claim is based in part on Respondents' failure to pay taxes or comply with other state laws in the states in which they allegedly operate; and in part on Respondents' acts and omissions regarding the FCC's 2004 audit, in which they failed to disclose the terminated licenses. (SAC, ¶¶ 50-60; [Vol. 6, AA01119-1124].) There is no question that failure to pay taxes is a violation of law; and thus the 17200 claim should not have been dismissed. This is particularly true since the failure to pay taxes has nothing to do with entry into the licensing market, or rate-setting.

Accordingly, the SAC should not have been dismissed.

**6) The FCA Savings Clause Prevents Dismissal Of Appellants' SAC**

Tellingly, Respondents failed to address, or even mention at all, the Savings Clause in their briefing to the Trial Court. There is a simple reason for this: Any doubt as to the limits of preemption under the FCA is dispelled by the Savings Clause itself, section 414 of the FCA, which specifically

preserves state law causes of action like the ones at issue here. Specifically, Section 414 provides:

> **§414 Exclusiveness of Chapter:**
> Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." (47 U.S.C. § 414.)

Numerous cases have interpreted this language in the context of State law tort, contract and statutory claims against a telecommunications company. For example, in *Bruss Co. v. AllNet Communication Services* (N.D. Ill. 1985) 606 F. Supp. 401, 411, the court held that Section 414 preserved the common law claims of the Plaintiffs because "[n]one of these causes of action conflicts with provisions of the Communications Act or interferes in any way with the regulatory scheme implemented by Congress. The Court therefore concludes that § 414 applies **to preserve** these causes of action." (Emphasis added.)

Likewise, in *Financial Planning Inst., Inc. v. American Tel. & Tel. Co.* (D. Mass. 1992) 788 F. Supp. 75, the court clarified the intended function of the savings clause:

> Not only did Congress *not* express an intent to provide for an exclusive federal remedy for a breach of contract for telecommunications services, but by enacting the savings clause, Congress specifically provided for the **preservation** of existing statutory and **common law claims**

> in addition to federal causes of action." (*Id.*, at 77 [emphasis added, italics in original].)

Similarly, in *Cooperative Communications, Inc. ("CCI") v. AT&T Corporation*, one telecommunications company sued another for intentional interference with prospective economic relations, interference with contract, business disparagement, breach of the covenant of good faith and fair dealing, unfair competition and other State law claims. The complaint was based on AT&T's alleged efforts to "drive CCI out of business" through a series of wrongful acts "as part of a systematic campaign aimed at discrediting CCI and interfering with CCI's customers." (*Cooperative Communications. Inc. v. AT&T Corp.* (D.C. Utah 1993) 867 F. Supp. 1511, 1514.) AT&T argued, as did Respondents below, that the State law claims were preempted under the Federal Communications Act. (47 U.S.C. §§ 151-613.) The District Court rejected AT&T Federal preemption argument, explaining that "the savings clause preserves causes of action for breaches of duties distinguishable from those created under" the FCA. (*Id.* at p. 1516.) Accordingly, "state law remedies which do not interfere with the federal government's authority over interstate telephone charges or services, and which do not otherwise conflict with an express provision of the Act, are preserved by section 414." (*Id.* [citations omitted].) State law claims based on wrongdoings other than challenging market entry criteria and rate setting do not fall within the scope of the FCA, period.

Citing a long line of cases holding that State law causes of action and State law remedies "do not interfere with the Federal Government's authority over interstate telephone and charges or services," the District Court in *Cooperative Communications* held:

> AT&T has not cited to any specific sections of the Communications Act which conflict with CCI's state law claims. Additionally, AT&T's contention that these claims are preempted ignores the purpose underlying Section 414. ... [I]nclusion of the savings clause clearly indicates Congress' intent that independent state law causes of action, such as interference with contract or unfair competition, not be subsumed by the Act, but remain as separate causes of action." (*Cooperative Communications, supra,* 867 F.Supp. at 1516 [emphasis added].)

The *Cooperative Communications* case is very similar to this one. Many of the same claims in that case are at issue here, including interference with contract and unfair competition. In *Cooperative Communications,* the court allowed the tort claims to survive demurrer so long as they were not based on market entry or rate setting. As set forth above, the claims here are not based on these prohibited categories. And, even if the claims incorporated challenges to market entry or rate setting criteria, that would not be enough to defeat them if they stated valid state law claims based on other

allegations. (*See, Connecticut Mobilecomm, supra; Terhell, supra; Platt, supra.*) Whereas the Trial Court and Respondents disregarded these authorities in favor of a "broad" presumption of preemption, the U.S. Supreme Court has confirmed that this was precisely the wrong approach. (*Altria Group, Inc., supra,* 2008 U.S. Lexis 9127 at *24, 29.) State law claims such as those in the SAC are routinely heard and the FCA does not preempt them.

**7) Public Policy – And The FCA Itself -- Also Weighs Against Preemption And Dismissal Of Antitrust Claims**

According to the Trial Court, "[a]djudication of" *all* "the state claims pled in the SAC would necessarily implicate the regulation of "entry" into the mobile service market," per *TPS Utilicom Services, Inc. v. AT&T Corp.* (C.D. Cal. 2002) 223 F. Supp. 2d 1089. Therefore, absent a final determination of cancellation and/or wrongdoing by the FCC, the Trial Court concluded it was stripped of jurisdiction. (Ord. at 3:21-27; Vol. 9, AA02089.) In so doing, the Court specifically rejected the rationale set forth in *Verizon Communications Inc. v. Trinko* (2004) 540 U.S. 398, and ignored Appellants' reference to section 601(b) of the FCA. (5/12/08 Tr. at 54:19-55:26 [Vol. 9, AA01978-79].) This is important because section 601(b) specifically exempts antitrust claims from the FCA -- and there is a strong stated public policy in favor of antitrust claims. (*See Trinko, supra.*)

As a matter of law, antitrust claims are not preempted generally under the FCA. (*Verizon Comm. Inc. v. Trinko* (2004) 540 U.S. 398, 406-407.)

Rather, the FCA expressly "preserves claims that satisfy existing antitrust standards." (*Id*; 47 U.S.C. § 152 (note).) There is a strong policy or "congressional intent" to have the antitrust laws survive the FCA, and to compliment the FCA's enforcement provisions. (*See, id.*) In the words of one Assistant Attorney General to Congress, "[t]he antitrust savings clause in the 1996 Act makes clear that the antitrust laws continue to apply fully in telecommunications, and are in no way displaced by the 1996 Act's own requirements." (R. Hewitt Pate, *Statement Before Comm. on Judiciary, U.S. Senate, Concerning Savings Clause*, Nov. 19, 2003, available at http://www.usdoj.gov/atr/public/testimony/201486.htm.) This is because "our economy . . . depend[s] more than ever on a robust, innovative, competitive telecommunications industry. Vigorous antitrust enforcement will continue to play a crucial role in fostering and protecting competition in this important sector." (*Id.*) The FCA and antitrust laws are complimentary, and not mutually exclusive. Thus public policy strongly supports Appellants' position that the antitrust claim for violation of the Cartwright Act is not preempted. This is particularly true, since, as set forth below in Section E, the Cartwright Act claim is properly pled.

### D. Appellants Need Not Allege That The FCC Made A Finding Of "Wrongfulness" To Avoid Preemption, Nor Is It Necessary That The FCA Create A Private Right Of Action

#### 1) A Finding Of Wrongfulness Has Nothing To Do With Preemption

In the hearing on May 12, 2008, the Court stated that "the underlying wrongful conduct here is something that the FCC should be determining in the first instance; and, until they do, my reading of the *TPS [Utilicom]* case is that I can't go forward with the state law claims." (5/12/08 Tr. at 68:9-16; Vol. 9, AA01984.) This is one of the principal errors made concerning preemption. To be clear, there is no requirement at all that the FCC make any finding of "wrongfulness" or liability in a claim that deals with damages for unfair competition, or antitrust violations, or any other claim. Nor did Respondents demonstrate that the FCC even has authority to hear and decide antitrust claims. The FCC itself, when it provided interpretative guidance of Section 332, held that state law tort claims are generally not preempted. (WCA Order, *supra,* 15 FCC RCD 17021.)

Indeed, in all of the cases addressing Section 332, one side or the other would arguably have benefitted from an FCC ruling on "wrongfulness." (*See, e.g., Cooperative Communications Inc. v. AT&T, supra,* 867 F.Supp. at 1514 [plaintiff alleged that AT&T tried to "drive [it] out of business;" no preliminary finding of liability by the FCC and no preemption under the FCA].) The Trial Court's

requirement finds no support in case law, or in the plain language of Section 332. Not one of the many published decisions addressing claims against mobile carriers imposes a prerequisite that the FCC determine liability "in the first instance." Rather, claims are not preempted unless they necessarily require a court to directly alter, "second guess," or "tread" upon an FCC determination. (*See, generally, Fedor, supra; TPS Utilicom, supra; Ball, supra.*) Because none of the claims directly challenge the FCC, they are not preempted.

**2) Whether The FCA Creates A Private Right Of Action For Claims Such As These Is Immaterial To The Outcome Of The Case**

To the extent that the Trial Court's requirement concerning a finding of "wrongfulness" might be construed as a ruling that Appellants cannot proceed with their claims absent an express "private right of action," this argument, too, fails. To explain, it appears that the Trial Court may have adopted Respondent PSI's argument that the FCA "does not confer a private right of action such as would allow Plaintiffs to pursue damages claims," and that "Congress did ***not*** intend to permit private lawsuits based on licensing disputes." (PSI Br. at 1:16-22; Vol. 6, AA01161; [emphasis supplied].) Respondent PSI explains this argument as follows: "When a regulatory statute authorizes only regulatory remedies, there is no private right of action," but accuse Appellants of urging this court to do just that: "create" "a private right of action based on a federal regulatory framework that makes no

such provision. . . . [and here,] "[w]ith the exception of" the seventh and eighth causes of action, all of Appellants' claims "seek damages predicated on allegations that [PSI] violated specific FCA statutes and/or FCC regulations." (PSI Br. at 6:8-13; Vol. 6, AA01166.) This argument, which conflates the creation or existence of a private right of action with a preemption argument, is fundamentally flawed. There are several reasons for this, as set forth below.

**a) Respondent PSI's "Private Right Of Action" Argument Ignores The Savings Clause**

Most fundamentally, nothing in the SAC suggests that Appellants are alleging a "private right of action" based on the FCA. On the contrary, each of the causes of action in the SAC is a tort based on violation of a common law or State law statutory duty, including, first and foremost, violation of California's antitrust statute, the Cartwright Act. In this regard, Respondent PSI's argument ignores, and would write out of existence, the Savings Clause of Section 414 that expressly preserves these types of claims. Indeed, "preserve" is the precise language used by Federal cases addressing the import of the savings clause. (*See, e.g., Bruss Co. v. AllNet Communication Services, supra,* 606 F.Supp. at 411.)

Notably, Respondent PSI cites no law concerning the FCA or an FCC decision in support of the assertion that the FCA needs to create a private right of action for damages for the simple reason that there is none. Rather, and as set forth in detail above, the FCC itself has stated the contrary, albeit in preemption terms. Specifically, the FCC has held

that "Section 332 does not *per se* preempt damage awards in state actions based on contract, tort or consumer protection law." *(In re Wireless Consumers Alliance Inc.* (2001) 16 FCC R.C.D. 5618, 5619.) This, of course, is because of the Savings Clause, Section 414 of the FCA – something which Respondent PSI failed even to address in their briefing of this issue below. (*See, generally,* PSI Mem. & Reply Br. ISO Demurrer; Vol. 6, AA01152-1178; Vol. 7, AA01459-1472.) As every Court addressing the issue has recognized, the specific preemption provision of the FCA under section 332 regarding entry into the market is qualified by the statutory language that provides "[n]othing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, **but the provisions of this chapter are in addition to such remedies.**" (47 U.S.C. § 414 [emphasis added]; *TPS Utilicom Services, Inc. v. AT&T Corp.* (C.D. Cal. 2002) 223 F. Supp. 2d 1089, 1108.) Respondent PSI not only ignored the statutory language adopted by Congress that remedies under the FCA are "in addition to" remedies existing at common law or by statute, Respondent PSI affirmatively argued that "Congress did not manifest any intent to allow such a private right of action, but instead established only administrative sanctions." (PSI Memorandum at 11:3-4; Vol. 6, AA01171.) Respondent PSI cites no authority under the FCA to support this argument. The argument is contrary to the above-quoted statutory language and to the many cases, and even FCC opinions, that address the issue.

**b) Whether The FCA Creates A Private Right Of Action For Damages Is Immaterial Because The SAC Alleges Viable Common Law Claims**

There is another reason why Respondent PSI's "private right of action" argument fails. Specifically, Respondent PSI's analysis of the "private right of action" doctrine in cases like *Crusader Insurance Company v. Scottsdale Insurance Company* (1997) 54 Cal. App. 4th 121 and *Greene v. Sprint Communications Co.* (9th Cir. 2003) 340 F.3d 1047 (Kozinski, J.) displays a fundamental misunderstanding and misapplication of the doctrine. Indeed, a brief look at *Crusader* shows that, in fact, it supports Appellants' contention that nothing in the FCA is intended to preclude or preempt private rights of action like the ones at issue in the SAC.

In *Crusader,* the Court of Appeal for the Second Appellate District considered which of two competing tests -- the "Restatement approach" or the "legislative intent approach" -- was the "proper test for determining whether a regulatory statute creates a new private right to sue" in the context of a statutory scheme regulating insurance. (*Id.* at 123.) The proper approach is the "legislative intent approach," which "examines the wording of the statute, its legislative history, its statutory context and similar factors, and asks whether the Legislature intended to create a new private right to sue by enacting the statute." (*Id.*) Applying this approach, the Court held that the particular action at issue, in which the plaintiff alleged that certain

insurance brokers failed to comply with provisions of the Insurance Code, was barred because there was no private right of action to enforce express violations of the insurance code provisions at issue, the enforcement of which was directly delegated to the Insurance Commissioner and not to private litigants. (*Id.* at 124.) Since the plaintiff had no "relationship or transaction with any defendants out of which any common law duty enforceable" by the plaintiff "could arise . . ." it "therefore had no common law causes of action to allege, such as negligence, breach of contract or implied covenant, fraud, negligent misrepresentation, etc." (*Id*, at 124-125.) Accordingly, the appellate court upheld the trial court's ruling on demurrer and dismissed the complaint. (*Id.*, at 138.)

In *Greene*, the plaintiffs argued that "an express private right of action" could be found in Section 206 and 207 of the Telecommunications Act "and that this necessarily implies a private right of action to enforce regulations." (*Greene, supra*, 340 F.3d at pp. 1049-1050.) These allegations, of course, prompted the Court to analyze whether the Federal statutes had in fact created a private right of action: "It is axiomatic that private rights of action must be created by Congress." (*Id.*, at 1050.) The Court held that there was no private right of action "to recover damages for . . . [an] alleged failure to pay compensation for dial-around calls as required by FCC regulations promulgated pursuant to § 276 of the Telecommunications Act." (*Id.*, at 1053.)

As the foregoing discussion suggests, there is an important difference between a claim that is based entirely upon the violation of statutory

provisions that regulate an industry and delegate enforcement of those regulations to specific agency personnel, and those which also allege facts forming the basis of common law causes of action. Whether a Federal statute creates a private right of action in citizens to enforce Federal regulations in a civil lawsuit has absolutely nothing to do with whether State law claims are preserved or preempted by a particular statutory scheme. These are entirely distinct inquiries, and there is nothing in Judge Kozinski's opinion in *Greene* that suggests that the two concepts ought to be confused in the manner suggested by PSI. The *Crusader* Court explained this difference as follows: the "legislative intent approach" in determining whether a statute creates a private right of action does not limit "available common law remedies." (*Crusader, supra,* 54 Cal. App. 4th at 134.) What this means is that even though a private right of action might not exist under one statutory scheme, a plaintiff is not precluded from bringing other claims if the allegations support them. In the insurance context, for example, the "determination" that certain statutes do not create a private right to sue "'usually does not matter' to an insured, because an insured may still pursue common law claims." (*Id.* [citations omitted].) So too here.

There is simply nothing in any of the language in the SAC, or in reason, which requires an analysis as to whether the FCA includes "rights creating" language that could create a private right of action to "enforce" the statute or its enabling regulations. (*Greene*, 340 F.3d at 1051.) Although Appellants' claims identify violations of the FCA, they are not

based upon a new private right of action under the FCA. Rather, as set forth above, they incorporate many other violations of state laws, such as the failure to pay taxes, the failure to comply with state laws, the conspiracy between both Respondents to restrain trade and gain competitive advantages over entities and persons such as Appellants, and the interference with specific contracts Appellants had with third parties. (SAC, ¶¶ 11, 13, 38, 40-42; [Vol. 6, AA01105-1106, 01113-15].) These allegations and others support numerous common law claims against Respondents in this case, as explained immediately below. (*See*, Section E, *infra*.) State law imposes duties on Respondents to refrain from anti-competitive conduct; Appellants did not need to allege -- and did not allege -- a private right of action to enforce the FCA. Thus whether the FCA theoretically might support a "private right of action" is immaterial to a determination of whether the demurrer should have been sustained.

### E. The SAC States Viable Causes Of Action Under State Law

The SAC is replete with state law allegations that are not preempted by the FCA. None of these claims should have been dismissed.

The first cause of action, for violation of the Cartwright Act, is premised in part on the fact that Defendant Mobex, together with Defendant PSI, agreed to restrain trade or prevent competition, or create a monopoly, by (among other things) "[f]ailing to pay fees, taxes and other costs imposed and required under State law." (SAC, ¶¶ 51(b), 52; [Vol. 6, AA01119-20].) Similarly, Appellants allege that Respondents "directly discouraged potential and

existing customers of plaintiffs and restrained plaintiffs' business" so that they could profit at Appellants' expense. (SAC, ¶ 51(i); [Vol. 6, AA01120].) This satisfies the pleading requirements for a Cartwright Act action. Since these allegations have nothing to do with second guessing the FCC's determinations as to issuance of licenses or rate setting, they are not preempted. This cause of action, then, should not have been dismissed.

The same is true of Appellants' second cause of action, interference with prospective economic advantage. To plead a cause of action for interference with prospective economic advantage, Appellants must allege "(1) a relationship between the plaintiff and some third party with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) a wrongful act, apart from the interference itself, by the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant." (*Salma v. Capon* (2008) 161 Cal. App. 4th 1275, 1290.) Appellants have alleged in part that Respondents caused them economic harm because Respondents "directly discouraged potential and existing customers of [Appellants] from consummating spectrum transactions" with Appellants "by falsely representing construction status and coverage, intercommunications, antenna site leases, and other aspects of service." (SAC, ¶¶ 56(b), 58-60; [Vol. 6, AA01121-1124].) These allegations state a claim for interference with prospective economic advantage. (*See, Salma, supra.*) Moreover, these allegations

have nothing to do with pricing, rates, or market entry. Therefore, this claim is not preempted by the FCA, either.

Appellants' fourth cause of action for fraud and their sixth cause of action for negligent misrepresentation also withstand demurrer. "[T]he required elements for claims for fraud [are]: (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or "scienter"); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage." (*Estate of Young v. Parker* (2008) 160 Cal. App. 4th 62, 79.) Negligent misrepresentation is also a "form of deceit, the elements of which consist of (1) a misrepresentation of a past or existing material fact, (2) without reasonable grounds for believing it to be true, (3) with intent to induce another's reliance on the fact misrepresented, (4) ignorance of the truth and justifiable reliance thereon by the party to whom the misrepresentation was directed, and (5) damages." (*Fox v. Pollack* (1986) 181 Cal. App. 3d 954, 962.) Here, Appellants have pled specific facts supporting both of these causes of action that are not preempted under the FCA. For example, Appellants have alleged that Mr. Havens met with Fred Daniels and Paul vander Heyden of Regionet in 1999 and that Messrs. Daniels and vander Heyden knowingly and/or negligently misrepresented to Mr. Havens that they had options to obtain all of the PSI licenses -- and that these misrepresentations (as well as others) interfered with Appellants' business opportunities. This in turn cost Appellants to lose business opportunities and to suffer damages. (SAC,

¶¶ 71-76; 84-89; [Vol. 6, AA01131-32; 01134-35].) Specific representations such as these suffice to allege a claim for fraud and negligent misrepresentations under state law. Again, these factual allegations do not "second guess" any FCC decision as to market entry or rate-setting.

Likewise, Appellants' ninth cause of action, a claim for intentional interference with contracts, cannot be dismissed on preemption grounds. "The elements which a plaintiff must plead to state the cause of action for intentional interference with contractual relations are (1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage." (*Pacific Gas & Elec. Co. v. Bear Stearns & Co.* (1990) 50 Cal. 3d 1118, 1126.) Here, Appellants have alleged that Respondents knew of particular contract, the Kurian Contract and the NUSCO Contract, and that they undertook the wrongdoings described in the SAC, including but not limited to competing unfairly by not paying taxes, and committing antitrust violations, to knowingly disrupt these contracts – and that these contracts were in fact disrupted. (SAC, ¶¶ 99-106; [Vol. 6, AA01136-37].) This has nothing to do with market entry or rates; and these allegations satisfy the elements of a claim as set forth in *Pacific Gas & Electric, supra*. Thus, the claim withstands demurrer.

The same is true of Appellants' seventh cause of action for violation of California's Unfair

Competition Law ("UCL"), Business & Professions Code sections 17200 et seq. To survive demurrer, Appellants need only allege that Respondents engaged in an "unlawful, unfair or fraudulent" business act or practice. (Bus. & Prof. Code § 17200.) Appellants have alleged that all of the acts and omissions alleged in the complaint, including the failure to pay State taxes, fees and discouraging Appellants' customers from consummating transactions with Appellants, give Respondents unfair and/or unlawful advantages and constitute unfair business practices. (SAC, ¶¶ 91-93; 56-60; 51-52; [Vol. 6, AA01135-36, 01121-1124, 01119-20].) Consequently, Appellants seek disgorgement of profits earned by Respondents, a remedy well-recognized in UCL law. (*See, Bank of the West v. Superior Court* (1992) 2 Cal. 4th 1254, 1266.) This satisfies all the pleading requirements of a UCL claim.

Finally, the "elements of a conversion claim are: (1) the plaintiff's ownership or right to possession of the property; (2) the defendant's conversion by a wrongful act or disposition of property rights; and (3) damages."[6] (*Mendoza v. Continental Sales Co.* (2006) 140 Cal. App. 4th 1395, 1405.) Here, Appellants have alleged facts sufficient to sustain this claim in their Tenth Cause of action:

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6 "Conversion is a strict liability tort. The foundation of the action rests neither in the knowledge nor the intent of the defendant. Instead, the tort consists in the breach of an absolute duty; the act of conversion itself is tortious." (*Mendoza v. Continental Sales Co.* (2006) 140 Cal. App. 4th 1395, 1405.)

Automatically terminated licensed stations reverted automatically and exclusively to Appellants, but by retaining control of those licensed stations, the Respondents deprived Appellants of their property and damaged them. (SAC, ¶ 108; [Vol. 6, AA01137].) This satisfies the pleading requirements for conversion; and the claim has nothing to do with regulation of rates or market entry. Thus, it is not preempted; and it should have survived demurrer.

### F. A Stay Is The Proper Remedy For Any Licenses About Which The FCC Has Not Yet Made A Final Determination

As set forth above, the Court accepted Respondents' unprecedented argument that the FCC has to determine whether Respondents in fact wrongfully retained the licenses at issue; and since the FCC had not made such affirmative determinations with respect to either the ongoing licenses or the "cancelled" or automatically terminated licenses, the case could not proceed. (*See, e.g.*, May 12, 2008 Tr. at 47:18-26; [Vol. 9, AA01971]; Ord. at 3:14-27; [Vol. 9, AA01989].) Although couched in language of preemption, the Court's ruling, and Respondents' arguments, are tantamount to an argument that Appellants have failed to exhaust their remedies with the FCC. The "theory" of exhaustion of remedies is that, "although a cause of action has arisen that is properly triable in the courts, exhaustion of that remedy is a procedural condition precedent to the action." (3 Witkin *California Procedure* Actions § 313 (2008).)

Had the Trial Court determined that final determination on all or some of the licenses was

necessary, then the proper remedy would be to stay the action until the FCC issues its decisions. Certainly, the Court has the inherent power to issue a stay under these circumstances. (*See*, Cal. Code Civ. Proc. §187.)

But Appellants' claims do not require further administrative proceedings, and the demurrer should have been overruled.

## IV. CONCLUSION

Contrary to Respondents' interpretations of Section 332, there is no presumption of preemption for state law claims against mobile service providers. On the contrary, basic statutory construction establishes that the limited scope of preemption reflected in Section 332 simply does not apply to Appellants' claims. There is no regulation of market entry, and certainly no "direct challenge" to any FCC criteria for market entry. The lower Court erred when it dismissed Appellants' claims. Accordingly, the decision should be overruled.

Dated: December 22, 2008

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**RULE 14(e)(1) CERTIFICATION**

As required by Rule 14(c)(1) of the California Rules of Court, I certify that this brief contains 13,754 words. In making this certification, I have relied upon the word count function of Microsoft Word, the computer program used to prepare the brief.

Dated: December 22, 2008

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App. 217

Case No. A122489

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION ONE

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WARREN HAVENS, TELESAURUS VPC, LLC, AMTS CONSORTIUM, LLC, INTELLIGENT TRANSPORTATION & MONITORING WIRELESS, LLC, AND TELESAURUS HOLDING GB, LLC,

*Plaintiffs and Appellants,*

vs.

MOBEX NETWORK SERVICES LLC, MARITIME COMMUNICATIONS/LAND MOBILE, LLC, AND PAGING SYSTEMS, INC.

*Defendants and Respondents.*

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# APPELLANTS' PETITION FOR REHEARING AND STAY

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**IMMEDIATE STAY REQUESTED PENDING OUTCOME OF PETITION BEFORE THE FCC**

## I. INTRODUCTORY STATEMENT

This Court's September 25, 2009 Opinion ("September 25 Opinion") rests on three erroneous assumptions. First, without conducting an analysis of each of the claims at issue, this Court's opinion assumes that all of the causes of action in the Second Amended Complaint ("SAC") uniformly seek to regulate the "procedure and terms or condition[s]" of "renewal, termination or revocation of licenses." (Op. at p. 20.) This is factually incorrect and ignores the legal mandate in cases like *Ball v. GTE Mobilenet of California* (2000) 81 Cal. App. 4th 529: Each and every cause of action must be separately evaluated before a court can rule it is preempted.

Second, the opinion assumes that any state-law cause of action based on the "revocation or termination" by the Federal Communications Commission ("FCC") of a license it issued "necessarily is" or implicates an "issue of market entry." (Op. at p. 20.) This is a mistake of law that ignores the FCC's own ruling in *In re Wireless Consumers Alliance ("WCA")* (2000) 15 F.C.C. R.C.D. 17201 and the Second Appellate District's opinion in *Spielholz v. Superior Court* (2001) 86 Cal. App. 4th 1366. *("Spielholz")*. Concurrently with this Petition, Appellants are seeking from the FCC a declaratory ruling to confirm that the narrow preemption standard articulated in *In re Wireless Consumers Alliance* applies with equal force to contentions of "market entry" preemption; on this basis Appellants also request that this Petition be

granted and a stay issued pending a ruling from the FCC.

Third, this Court implies that Appellants argue that 47 U.S.C. § 414 somehow "trumps" or preserves claims that are otherwise preempted under 47 U.S.C. § 332. (Op. at pp. 25-26.) This is not what Appellants argued.

Because the underlying factual predicates upon which several of these assumptions are based are incorrect, and because the Court's opinion misstates the law on federal preemption, rehearing is warranted. Appellants' reasoning is set forth below.

## II. REHEARING IS WARRANTED BECAUSE THE COURT'S SEPTEMBER 25 OPINION IS BASED ON ERRONEOUS LEGAL PRINCIPLES AND FACTUAL MISCONCEPTIONS

### A. The Court Must Examine All The Factual Allegations And Grant Rehearing To Determine Whether Each Claim Is or Is Not Preempted

Each claim in a pleading must be examined individually to determine if it is preempted. *See, Ball, supra,* 86 Cal. App. 4th at pp. 537, 541, 543. As one commentator has explained, "FCC preemption is not complete or total. ... The deregulation laws that eliminated specific federal acceptance of telecommunications company tarrifs has created a much larger role for state law, and this fact is sufficient to preclude a finding that Congress intended completely to occupy the field, following the 1996 Act. But the scope of post-deregulation preemption is fragmented with diverging court

opinions, and requires a particularized examination in each setting." O'Reilly, J., *Federal Preemption of State and Local Law: Legislation, Regulation and Litigation*, Ch. 11, p. 100 (ABA 2006) (citations omitted); *see, also, WCA, supra,* 15 F.C.C. R.C.D. at 17022, ¶ 2. This analytical framework reinforces the well-established "presumption against preemption," which recognizes that "Congress' intent to preempt must be clear and manifest to preempt state law in a field traditionally occupied by the states, such as the exercise of a state's police powers." *Spielholz, supra,* 86 Cal. App. 4th at pp. 1371-1372. It is also in keeping with the standard of review on appeal: A "trial court commits reversible error when it sustains a demurrer without leave to amend" if the facts alleged show entitlement to relief "under any possible legal theory." *Platt v. Coldwell Banker Residential Real Estate Servs.* (1990) 217 Cal. App. 3d 1439, 1444; *Ball, supra,* 81 Cal. App. 4th at 534-535.

Both *Ball* and *Spielholz* illustrate the fundamental principle set forth above. In *Ball, supra,* the California Court of Appeal, Third Appellate District, considered whether providers and owners of telephone services and related services rightly charged customers for "noncommunication time," including time rounded up to the next full minute. *Ball,* 81 Cal. App. 4th at p. 533. For certain causes of action, the plaintiffs were seeking an injunction against the rates charged as a remedy. *Id.,* at 536. The court held that resolution of the claims would require the court to engage in regulation of the rates charged, and so those

particular claims for injunctive relief were preempted. *Ball,* 81 Cal. App. 4th at p. 540-541.

There were other claims in the *Ball* complaint, however, that were not preempted, including claims for damages based on a challenge to the defendants' failure to disclose a particular rate or rate practice to the consumer. *Id.*, at p. 543. The *Ball* court explained that Section 332 preempts only those "state law action[s] challenging the reasonableness or legality of the particular rate or practice itself," but not claims that attempt to regulate the other terms and conditions of cellular services, such as fair disclosure of rates to consumers. *Id.*

In *Spielholz,* the plaintiffs filed a complaint alleging (among other things) causes of action for unfair business practices, false advertising, breach of contract, and negligent misrepresentation. 86 Cal. App. 4th at p. 1368. The trial court held that many of the causes of action were preempted, infringing on the rate-setting function of the FCC. *Id.* Following this adverse ruling, one plaintiff petitioned the Second District Court of Appeal for a writ of mandate to overrule it, and another plaintiff, a wireless company, petitioned the FCC for a declaratory ruling on the preemption issue.[1] *Id.*; *see, also, WCA, supra.* Applying the *WCA* ruling that Section 332 generally does not preempt awards of damages based on state tort or contract claims to the allegations in the complaint at bar, the Second Appellate District found that the claims for damages

[1] The FCC petition resulted in the *WCA* decision.

based on false advertising did not directly challenge rates, and were not precluded. *Id.*, at p. 1376.

Rather than examine each cause of action individually, as the court did in *Spielholz* and *Ball*, this Court examined only certain allegations and held that the entire SAC was preempted because it attempted to regulate market entry. Indeed, the Opinion attempts to mischaracterize this suit as a challenge by a disgruntled auction participant regarding an auction bidding discount. Specifically, Opinion begins its preemption analysis by stating that to the extent the causes of action in the SAC "were based upon allegations that defendant Maritime obtained a bidding credit to which it was not entitled, they were clearly preempted." Op. at p. 19. The SAC makes this particular allegation in conjunction with the antitrust claim as the last identified of 9 specific violations of law; the Opinion disregards the fact that the FCC itself already determined that defendant MCLM in fact violated the FCC's rules in a "determination by final action". AA 01119-01120; 01132.

The Opinion, by observing that a reference to an illegal bidding credit renders the entire complaint "clearly preempted," is doubly erroneous: That conclusion ignores the FCC's own final determination and ignores that a complaint for damages based on an FCC's ruling does not "second guess" the FCC determination.

The cause of action for intentional interference with contracts is likewise not addressed at all in the Court's September 25 Opinion. That cause of action is grounded in the allegations that Appellees interfered with the Kurian and NUSCO

contracts, two valid contracts that Appellants had and could not follow through on because Appellees induced a specific individual to breach a specific contract:

> (a) in the matter of the Kurian Contract, ... [PSI and MCLM]
>
> (i) caus[ed] ... the former wife of T. Kurian to make false and otherwise baseless claims, including that T. Kurian ... held, individually, free and clear title to a certain FCC AMTS license and had legal authority to enter the Kurian Contract to assign said license to ACL ... ;
>
> (ii) mak[e] false statements to T. Kurian, including about ACL, that ... caused him to breach provisions in the Kurian contract; and
>
> (b) In the matter of the NUSCO Contract, ... PSI with cooperation from MCLM, ... [made] false claims to NUSCO and other parties of alleged encumbrances in a certain FCC AMTS license held by ACL that AC agreed to assign to NUSCO under the NUSCO Contract. ... AA 01110-0111; 01136-01137.

These allegations do not directly challenge an FCC determination, have nothing to do with the "procedure and terms or condition[s]" of "renewal, termination or revocation of licenses," and in no way

implicate FCC regulation of entry into the marketplace. Op. at p. 20. Indeed, the allegations are most clearly not preempted because they say nothing about Appellees' licenses, revoked or otherwise. Rather, these claims are grounded in Appellees' false representations to third parties that interfered with Appellants' ability to conduct business. In this regard, the allegations are indistinguishable from the false advertising claims in *Ball* – claims that the trial court erroneously dismissed under section 332, and that were then reversed on appeal. *Ball, supra,* 81 Cal. App. 4th at p. 543.

In addition to the omission as to the cause of action for intentional interference with contract, there is no analysis of Appellants' conversion or unfair competition claims in the September 25 Opinion; and no analysis of the causes of action for fraud or interference with prospective economic advantage. Likewise, the Court's September 25 Opinion fails to identify any cause of action that actually "second guesses" an FCC ruling. *TPS Utilicom Svcs. v. AT&T Corp.* (C.D. Cal. 2002) 223 F.Supp.2d 1089, 1108. Where the FCC has stripped a party of licenses, how does a claim for damages consistent with that ruling "second guess" the FCC decision so as to "regulate market entry." How do violations of state law, completely unrelated to issuance of a license and that apply to any purportedly bona fide entity, constitute regulation of market entry? Finally, the Court's Opinion fails to address the fact that many of the causes of action can stand even if allegedly offensive allegations are struck.

The failure to conduct an individualized analysis of each of the causes of action in the SAC runs contrary to well-established law. Accordingly, reconsideration is warranted to conduct a thorough, proper analysis of each of the causes of action in the SAC.

### B. Causes Of Action Incorporating Allegations Of Automatic Termination Of An FCC License Are Not Preempted

Contrary to this Court's September 25 Opinion, not every cause of action for damages based on the revocation or termination of an FCC-granted license necessarily implicates regulation of market entry. (Op. at pp. 20-21.) Indeed, there is no precedent for such a broad ruling at all, and it runs contrary to FCC precedent and prior rulings of other appellate districts. It strips plaintiffs of bona fide state law claims.

"Section 332 does not generally preempt the award of monetary damages by state courts based on state consumer protection, tort, or contract claims. ... [Instead,] whether a specific damage calculation is prohibited by Section 332 will depend on the specific details of the award and the facts and circumstances of a particular case." *WCA*, *supra*, 15 F.C.C. R.C.D. at 17022, ¶ 2. This Court's September 25 Opinion disregards this fundamental principle – a principle enunciated by the FCC itself and adopted in *Spielholz* and other precedent. In the context of rate regulation, this means the court must examine each claim to determine if the state court monetary

award "*directly* regulate[s] rates." *Spielholz, supra*, 86 Cal. App. 4th at 1374.[2] If it does, then the claim will be preempted. The same is true in the context of market entry: Only those claims that directly regulate market entry will be preempted. *Fedor v. Cingular Wireless Corp.* (7th Cir. 2004) 355 F.3d 1069, 1072, 1075.

This Court's opinion in effect rewrites section 332 to replace preemption of "regulation" of market entry with that of preemption of "any claim that relates to" market entry. In *Speilholz*, the Second Appellate District held that if a state court claim for damages implicates rate-making *indirectly* by requiring a court to make "a determination of the value of services provided," then it will *not* be preempted. 86 Cal. App. 4th at 1374. **The Court correctly explained that a "judicial act constitutes rate regulation only if its *principal purpose and direct effect* are to control rates.** *(Id.)*[3] For example, an injunction that prevents a

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[2] In *Spielholz*, the plaintiffs both petitioned the FCC and sought appellate review after the erroneous decision of dismissal under Section 332 in the trial court. (*Spielholz, supra*, 86 Cal. App. 4th at 1370.) The Court of Appeal issued a stay pending the outcome of the proceedings before the FCC. For these same reasons, a stay is appropriate in the pending matter.

[3] FCA § 332 preemption involves regulation by state and local government. Yet state-law claims can be pursued and decided in Federal courts, and actions of Federal courts obviously are not state or local government regulation. This fact, and the fact that Congress chose the word "regulate," further demonstrates that §332 preemption is not fundamentally based upon court actions. Appellants maintain their position in that

wireless telephone service provider from charging specified rates would directly regulate rates. Similarly, if a cause of action directly challenges a rate as unreasonable, an award of damages or restitution to compensate the customer for the difference between the rate paid and what the court determines to be a reasonable rate would directly regulate rates." *Id.*, at 1374-1375 (emphasis added), *citing Ball, supra*, 81 Cal. App. 4th at pp. 537-538. Again, the same would be true for claims challenging market entry. *See, Fedor, supra.*

By holding broadly that claims based on "an initial grant of a license, subsequent renewal, revocation or termination of a license" "necessarily" implicate market entry and therefore preemption, the Court's Opinion ignores the mandate of *WCA*, *Spielholz,* and *Fedor*. This blanket holding does not take into account whether the trial court must actually engage in regulation of market entry in crafting a remedy as to each of the causes of action; indeed, it fails to make any examination of the remedies sought here, and it allows the Court to ignore the specific allegations in the SAC. (*See, discussion, supra*, Section II(A).)

Here, the remedies sought – damages for lost business opportunities and interference with contracts that Appellants held, and punitive damages for Appellees' intentional and wrongful conduct, among other things – do not regulate market entry. AA 01139-01141. The requested relief does not require the Court to revoke or

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regard, as previously argued

terminate a license, or even "second guess" an FCC decision to allow Appellees into the marketplace. *See, TPS Utilicom Svcs., supra,* 223 F.Supp 2d at p. 1108 (Section 332 prevents "second-guessing of the FCC auction participation criteria" by challenges under state law). It does not seek, either, to cause more infrastructure to be built. *See, e.g., Fedor, supra,* 355 F.3d at 1072. If any of those things were the case, the claims would be preempted. But here, many of the licenses have already terminated as a matter of law. *See, generally,* SAC, AA 001100-AA01141. Appellants have suffered damages because Appellees lied to persons with whom Appellants had contracts, and because Appellees hoarded and warehoused licenses – licenses that the FCC itself determined had automatically terminated years earlier. AA 01107. This Court's opinion absolutely fails to confront this fact. Instead, the Court's opinion treats all allegations alike, whether or not the FCC revoked the license. Op. at p. 23.

The FCC does not award damages for wrongful business practices; instead, it regulates the issuance of licenses, infrastructure, and the revocation of licenses. *See,* 47 U.S.C. §§ 151, 303-312. The relief requested here does not regulate any of these things. Accordingly, the Court erred as a matter of law, and rehearing is warranted.

### C. Rehearing is Warranted Because, Contrary To The September 25 Opinion, Appellants Did Not Argue That Section 414 Eclipses Or "Supersedes" Section 332

Finally, rehearing is warranted because this Court (1) mischaracterized Appellants' argument

concerning 47 U.S.C. § 414 and (2) ignored a fundamental inquiry in savings clause arguments: Are the causes of action based on breaches of duties distinguishable from those created under the Federal Communications Act ("FCA")? *Cooperative Communications, Inc. v. AT&T Corp.* (D. Utah 1994) 867 F. Supp. 1511, 1516; *Altria Group, Inc. v. Good* (2008) 129 S. Ct. 538, 545.

First, according to this Court, Appellants argued that Section 414 preserved the state law claims, *regardless of whether the claims were preempted by Section 332*: "Plaintiffs argue that the court erred in finding their claims preempted because this 'savings clause' specifically preserves their claims based upon the license warehousing allegations. They are wrong ... We agree with *Ball* that this savings clause preserves only state law claims or remedies that *are not otherwise expressly preempted by section 332(c)(3)(A)*." Op. at p. 25 (emphasis in original).

The September 25 Opinion makes no specific reference to Appellant's arguments, either in briefs or oral argument, to support what is in effect a straw man argument – designed to rebut a contention that Appellants never made.

Certainly, "[s]avings clauses cannot be construed in a manner that destroys the efficacy of the federal statute; where continued existence of a state common-law remedy would be inconsistent with the federal law system, the state remedy cannot be saved by a federal statute's savings clause." *Federal Preemption of State and Local Law, supra*, Ch. 11, at p. 102. Appellants do not dispute this. Instead, Appellants take issue with the Court's

holding because it misstates what Appellants actually argued: That the claims fell within the scope of the savings clause because they were not preempted by Section 332; and that the Savings Clause "preserves causes of action" that arise from breaches of duties different from the legal duties that are encompassed by the FCA. (Opening Br. at pp. 13-31; Reply Br. at pp. 19-20.) Appellants' contention that the Savings Clause further demonstrates Congressional intent for narrow preemption under the FCA is nearly verbatim from the published opinion in *Spielholz, supra,* 86 Cal. App. 4th at 1327-1374

Second, there is simply no discussion in the Court's Opinion of the breaches of duties encompassed by the FCA and the state law causes of action. Op. at p. 26. When this analysis is made, it displays a fundamental flaw in the Court's reasoning.

Duties encompassed by the FCA include the regulation and issuance of licenses, and regulation of interstate and foreign commerce in communications by wire and radio. *See, e.g., Cooperative Communications,* 867 F. Supp. at p. 1515; 47 U.S.C. § 307. Separate and apart from the FCA, there is a duty not to interfere with others' contracts and others' business opportunities. *See, e.g. Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1126 (intentional interference with contracts). Similarly, there is a duty not to engage in antitrust or anticompetitive activities. *See, e.g.,* 47 U.S.C. § 152, note 5. Likewise, there is a duty not to retain control of and dominion over others' property or property rights, such as the use of Appellants'

spectrum. *See, e.g.*, *Mendoza v. Continental Sales Co.* (2006) 140 Cal.App.4th 1395, 1404–1405 (conversion).[4] None of these duties are encompassed by the FCA. Accordingly, rehearing is warranted.

## III. CONCLUSION

Appellants fully appreciate the practical difficulty of obtaining rehearing. This Court's opinion, however, stands on head the constitutionally-rooted "presumption against preemption." FCA preemption is narrow, not broad. Each cause of action must be considered as to whether it directly challenges an FCC determination and is, therefore, tantamount to "regulation" of rates or market entry. A conclusion of preemption without this requisite analysis erroneously deprives a party of a fair hearing on meritorious state law claims. The interference claims on the Kurian and NUSCO contracts, and similar allegations, should have been addressed. If the specific allegations and requested remedies are examined, it is apparent that not every claim or allegation "directly challenges" or "second guesses" an FCC decision. For the foregoing reasons, Appellants' Petition for Rehearing should be

[4] It is no answer to state that *Cooperative Communications* was decided prior to 1996, when Section 332 was enacted, or that *Altria Group* does not address Section 332. Op. at p. 26. Indeed, this fundamental inquiry concerning the duties at issue in the causes of action alleged is one that has guided savings clause and preemption inquiries for years. *See, e.g.*, *Spielholz, supra*, 86 Cal. App. 4th at 1374 ("Courts have held that the saving clause preserves state law remedies for breaches of duties that are distinguishable from duties created under the act.") (citing cases, including *Cooperative Communications*).

granted. Alternatively, a stay should issue pending the conclusion of the related proceedings before the FCC.

Dated: October 13, 2009

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**RULE 8.204(c)(1) CERTIFICATION**

As required by Rule 8.204(c)(1) of the California Rules of Court, I certify that this brief contains 3428 words. In making this certification, I have relied upon the word count function of Microsoft Word, the computer program used to prepare the brief.

Dated: October 13, 2009

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Supreme Court
of the
State of California

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WARREN HAVENS, TELESAURUS VPC, LLC, AMTS CONSORTIUM, LLC, INTELLIGENT TRANSPORTATION & MONITORING WIRELESS, LLC, AND TELESAURUS HOLDING GB, LLC,

*Petitioners,*

vs.

MOBEX NETWORK SERVICES LLC, MARITIME COMMUNICATIONS/LAND MOBILE, LLC, AND PAGING SYSTEMS, INC.,

*Respondents.*

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**Petition for Review**

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From a Non-Published Decision of the Court of Appeal (1st Dist., Div. 1; A122489) Affirming an Order of the Superior Court of San Mateo County Granting on Demurrer Without Leave to Amend
The Honorable Carol L. Mittlesteadt
Case No. CIV-463985

**STAY REQUESTED**

## I. ISSUE PRESENTED

47 U.S.C. § 332(c)(3)(A), provides in part that "no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services." And, 47 U.S.C. § 414 states that "[n]othing in this chapter [of the Federal Communications Act] ... shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."

Does 47 U.S.C. § 332(c)(3)(A) include within its preemptive scope all state law causes of action for damages arguably "related" to misuse of a license issued by the Federal Communications Commission ("FCC"), and even claims totally unrelated to a license, or just those claims tantamount to "regulation" of rates and market entry?

## II. INTRODUCTORY STATEMENT

This case presents a question of the utmost importance to litigants all over the State who hold FCC licenses: Can a FCC licensee actively interfere with the right of a competitor to enter into contracts, hoard and warehouse expired licenses, and then escape liability for damages by invoking the preemption clause in 47 U.S.C. § 332(c)(3)(A)?

The FCC itself has explained that the scope of 47 U.S.C. § 332(c)(3)(A)'s preemption clause is narrow, and that it generally does not preempt state law damages claims. (In re Wireless Consumers Alliance, Inc. ("WCA") (2000) 15 FCC RCD 17021, at

p. 17026, ¶ 9.) For example, although Section 332 preempts actual rate-setting, it does not preempt state contract or consumer fraud laws relating to the disclosure of rates and rate practices. (See, id., at p. 17028-29, ¶ 14.)

Two California Courts of Appeal also interpret Section 332 narrowly, to prevent consideration only of those claims that "directly" tread upon rate setting or market entry. In Ball v. GTE Mobilnet of California (2000) 81 Cal.App.4th 529, the California Court of Appeal, Third Appellate District, considered whether providers and owners of telephone services and related services rightly charged customers for "noncommunication time," including time rounded up to the next full minute. (Id., at p. 533.) For certain causes of action, the plaintiffs were seeking an injunction against the rates charged as a remedy. (Id., at 536.) The appellate court held that resolution of the claims would require the court to engage in regulation of the rates charged, and so those particular claims for injunctive relief were preempted. (Ball, 81 Cal. App. 4th at p. 540-541.)

There were other claims in the Ball complaint, however, that were not preempted, including claims for damages based on a challenge to the defendants' failure to disclose a particular rate or rate practice to the consumer. (Id., at p. 543.) The Ball court explained that Section 332 preempts only those "state law action[s] challenging the reasonableness or legality of the particular rate or practice itself," but not claims that attempt to regulate the other terms and conditions of cellular services, such as fair disclosure of rates to consumers. (Id.)

Similarly, in Spielholz v. Superior Court (2001) 86 Cal.App.4th 1366, rev. denied, 2001 Cal. LEXIS 3519 (Cal. May 23, 2001), the plaintiffs filed a complaint alleging (among other things) causes of action for unfair business practices, false advertising, breach of contract, and negligent misrepresentation. (Id., at p. 1368.) The trial court held that many of the causes of action were preempted, infringing on the rate-setting function of the FCC. Id. Following this adverse ruling, one plaintiff petitioned the Second District Court of Appeal for a writ of mandate to overrule it, and another plaintiff, a wireless company, petitioned the FCC for a declaratory ruling on the preemption issue.[1] (Id.; see, also, WCA, supra.) Applying the WCA ruling that Section 332 generally does not preempt awards of damages based on state tort or contract claims, the Second Appellate District held that the claims for damages based on false advertising did not "directly regulate" rates, and were not precluded. Id., at p. 1375.

Finally, this Court has repeadedly held that there is a two-step analysis for federal preemption: First, a court must determine whether a particular claim falls within a traditional area of a state's exercise of its police power; and second, can the party arguing for preemption meet its burden to demonstrate a "clear and manifest" congressional purpose to preempt state law? (See, e.g., Betancourt v. Storke Housing Investors (2003) 31 Cal. 4th 1157, 1167-1168, Viva! Int'l. Voice for Animals v. Adidas Promotional Retail Operations, Inc. (2007) 41 Cal. 4th 938-939.) WCA, Ball, Spielholz and prior

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[1] The FCC petition resulted in the WCA decision

decisions of this Court each instruct courts to conduct a case-by-case analysis of each claim, looking to the remedies sought in order to determine whether the particular claim is preempted. None of the decisions allow blanket rulings generally precluding all claims arising out of a particular kind of transaction or involving one particular issue. This claim-specific analysis is required to preserve the constitutionally-based "presumption against preemption" and to ensure that valid claims are not thrown out together with those that might be preempted. (Id.; Spielholz, supra, 86 Cal.App.4th at 1372.)

In the present case, the Court of Appeal ignored these well-established rules and analytical framework, and reached a contrary conclusion. Without conducting analysis of each and every claim, the Court of Appeal held broadly that all claims based on "an initial grant of a license, a subsequent renewal, revocation or termination of a license" granted by the FCC "necessarily" implicate market entry and are preempted. (Op. at 20.) According to the Court of Appeal, "control over" any "disputes or decisions" concerning licensing, even those above and "beyond the initial grant of a license[,] are essential to the federal regulation of market 'entry.'" (Id.) Therefore, all of the claims presented by Petitioners were preempted under Section 332.

The issue on which this case departs from other decisions of the California Courts of Appeal raises an important issue of law meriting this Court's attention. The holdings in WCA, Spielholz and Ball each pay homage to fundamental principles of federalism, recognizing that, "Congress' intent to preempt must be 'clear and manifest' to preempt

state law in a field traditionally occupied by the states." (Spielholz, supra, 86 Cal. App. 4th at 1371-1372.) As this Court, the Court of Appeals, and the Supreme Court of the United States routinely acknowledge, there is a "presumption against preemption" under these circumstances (id. at 1372 (emphasis added); see, also, Olszewski v. Scripps Health (2003) 30 Cal. 4th 798, 815-816) and an "'assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" (Altria Group, Inc. v. Good (2008) 129 S. Ct. 538, 543; see, also, Wyeth v. Levine (2009) 129 S.Ct. 1187, 1195 and n. 3.) Indeed, the Federal Communications Act ("FCA") recognizes this principle, and includes a savings clause that expressly preserves traditional common law state court causes of action. 47 U.S.C. § 414.

The Court of Appeal's decision in this case guts these foundational principles of law and sets a dangerous precedent that will preclude and deter all similarly situated litigants from ever bringing a suit if their claims are in any way based upon, arguably "related to," or incorporate allegations of licensing.

The Supreme Court should grant review in this case to secure uniformity of decision and resolve the conflict created between this decision and cases like WCA, Spielholz, and Ball. The Court should also grant review to settle an important issue of law: Can FCC operators and licensees, harmed by their competitors' dishonest dealings, seek damages based on those actions if the allegations in the complaint broadly concern or arguably relate to licensing?

## III. STATEMENT OF THE CASE

### A. Underlying Facts Giving Rise To The Dispute

Since 1988, Plaintiff/Petitioner Warren Havens' principal occupation has been obtaining licenses, including licenses in the Automated Marine Telecommunications Services ("AMTS") frequency spectrum, issued by the Federal Communications Commission ("FCC"), and developing businesses based on new wireless communications services for government entities, critical infrastructure companies, and others. (SAC, ¶ 1; [Vol. 6, AA01121].)[2] His companies include the other Petitioners in this case, Telesaurus VPC, LLC, AMTS Consortium LLC, Intelligent Transportation & Monitoring Wireless LLC, and Telesaurus Holdings GB LLC (together, "Petitioners"). Together, Petitioners have cooperated over the years to obtain and use their FCC licenses principally for providing new, advanced, wireless services essential for "Intelligent Transportation Systems" ("ITS") as defined and supported by the US Department of Transportation, the California Department of Transportation, and other agencies of the State of California, the FCC, and other federal and State agencies. (SAC, ¶ 32; [Vol. 6, AA01109].) Petitioners are pursuing a cooperative wireless business plan for the ITS market under a research contract with the University of California, a publicly funded institution. (SAC, ¶ 33; [Vol. 6, AA01110].) In addition, Petitioners and their interest owners

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2 "AA" refers to Appellants' Appendix. The "SAC" refers to the Second Amended Complaint, the operative pleading in this case.

also have executed charitable contributions, under agreements, and pledges for future contribution agreements, to nonprofit corporations. (Id.) In short, Petitioners are using their FCC licenses for promoting the public good and public access to ITS.

According to the FCC, the telecommunications industry reported $299 billion in revenues in 2007, $121 of which was related to wireless. (http://www.fcc.gov/Daily_Releases/Daily_Business/2009/db0903/DOC-293261A1.pdf.) In California, wireless technology services have grown exponentially in the last 25 years, with more than 160 wireless service providers in the US. (http://www.mobilefuture.org/states/california_wireless.) The importance of the type of private-public partnerships is described in the Second Amended Complaint in connection with Intelligent Transportation Systems, as well as government web sites. (SAC,¶¶ 32-33; [Vol. 6, AA01109]; http://www.itsdocs.fhwa.dot.gov/jpodocs/repts_te/13772.html.)

The Defendants/Respondents in this case are Petitioners' competitors, Mobex Network Services, LLC ("Mobex") and the companies Mobex acquired over the past few years, Regionet Wireless License LLC, and Waterway Communications; Maritime Communications/Land Mobile, LLC ("Mobex"), and Paging Systems, Inc. ("PSI") (together with Mobex, "Respondents").

Over the past few years, Respondents have interfered substantially with Petitioners' business. They have, for example, made specific misrepresentations to individuals and entities under contract with Petitioners, interfering with these

contracts, including the Kurian contract and a contract with Northeast Utility Service Company ("NUSCO"). (SAC, ¶ 34; [Vol. 6, AA01110-11].)

Respondents have also repeatedly violated the laws of the various states in which they operate, in order to unfairly compete with Petitioners and others. For example, both Respondents here failed to register as out-of-state legal entities to do business in particular States, a threshold requirement for operating certain stations in those States; and they have failed to file income tax returns and pay other filing fees required by those States. (SAC, ¶¶ 11-13; [Vol. 6, AA01105 - 1106].) These acts and others like them have caused Respondents to accrue an unfair business advantage over Petitioners by reducing costs of doing business in an illegal and unfair manner.

In addition, Respondents have repeatedly violated FCC rules to Petitioners' detriment. Specifically, FCC rules require that when a site-based AMTS license is issued, the required component stations must be "constructed," and operations actually commenced, within two (2) years of obtaining the license. (SAC, ¶ 38; [Vol. 6, AA01112-14].) If a licensee fails to construct a station within the construction period, the license for the station terminates automatically without any required action on the part of the FCC. (Id.) Assuming a license terminates automatically, the holder of the former licenses is required to notify the FCC of the termination for cancellation. (Id.) If not spectrum hoarding and warehousing can occur, meaning that entities may pretend to own and operate licenses that have terminated for the purpose of preventing competitors from doing so.

Spectrum hoarding and warehousing is against the public interest purpose of wireless licensing and license applications under the FCA, FCC Rules, and other laws. (SAC, ¶ 41; [Vol. 6, AA01115].)

The FCC has already determined that many of Respondents' licenses automatically terminated and has identified them as "cancelled." (SAC, ¶¶ 18, 42; [vol. 6, AA 1107, AA 001115.]) Despite the clear automatic termination requirements and prohibition on spectrum hoarding and warehousing, Respondents have hoarded and warehoused licenses that have automatically terminated by failing to construct stations within the applicable periods, and thereafter not surrendering the license to the FCC for cancellation as required under FCC Rules. (SAC, ¶¶ 40-42; [Vol. 6, AA01114-1115].) Similarly, Respondents falsely reported to the FCC that their terminated stations were properly and timely constructed to avoid FCC cancellation but eventually, the FCC conducted an audit of Respondents' station license in which it determined that Respondents had failed to construct a major percentage of the component stations within the applicable time period. (SAC, ¶ 42; [Vol. 6, AA01115].)

These actions and others gave Respondents unfair and competitive business advantages over Petitioners in the wireless market, and they formed the basis of Petitioners' action.

**B. Procedural History**

**1. The Operative Complaint Alleges Violations Of Traditional State Law Causes Of Action, Such As Interference with**

**Prospective Economic Advantage, And Seeks Damages Based Upon Them**

Appellants filed their first Complaint for interference with prospective economic advantage, unfair competition, and other California State law claims on June 22, 2007. (Vol. 1, AA00001-24.) Thereafter, on November 5, 2007, Appellants voluntarily filed a First Amended Complaint ("FAC"). (Vol. 5, AA 00804-834.) On December 21, 2007, Respondents filed demurrers to the FAC. (Vol. 5, AA00875-925.)

On February 11, 2008, the lower Court, in effect applying an exhaustion of administrative remedies requirement, sustained the demurrer with leave to amend to allege facts sufficient to show that, with regard to specific identified licenses, the FCC "has finally determined that [Respondents]. . . wrongfully retained cancelled licenses." (Vol. 6, AA01087-1088 pages 2:26-3:1 [emphasis added].)

With this directive in mind, Appellants filed their SAC on March 19, 2008, and separated out the "cancelled" or automatically terminated licenses from those that were still the subject of ongoing FCC proceedings (referred to in the SAC as "Challenged Licenses – Ongoing").[3] (See, e.g., SAC, ¶¶ 18-19;

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[3] The term "Cancelled Licenses" refers to those licenses formerly held by Respondents that automatically terminated and were subsequently identified by the FCC as cancelled. (SAC, ¶¶ 18, 28, Vol. 6, AA01107-01108); Exhibit A to the SAC provides a list of these licenses. Vol. 6, AA01142-1144.) These licenses are already the subject of final determinations by the FCC and are no longer subject to any appeal or right of appeal. (SAC, ¶ 28, Vol. 6, AA01108.) "Challenged Licenses -- Ongoing" refers to those

[Vol. 6, AA01107].) Appellants' SAC did not add any new causes of action. Rather, the SAC made different changes that are important here. The SAC split up the causes of action for various torts already existing in the FAC, such as interference with contracts and conversion, into two separate sets of actions: One cause of action for each tort pertaining to the Challenged Licenses – Ongoing, and one cause of action for the cancelled licenses for which the revocation of respondents' FCC licenses was final. (See, e.g., SAC, ¶¶ 107-112; [Vol. 6, AA01137-1138].) New allegations were also added to Appellants' Cartwright Act claims for the cancelled and ongoing licenses. Specifically, Appellants allege that Respondents Mobex and PSI violated the Cartwright Act in part because they failed to meet State law filing, tax, and real-estate property-access requirements for States in which they purport to own and operate AMTS CMRS Stations under the Ongoing Licenses previously cancelled by the FCC. (See, e.g., SAC, ¶¶ 13; 50-53; [Vol. 6, AA01106, 01119-21].)

All of these acts, (and others) gave Respondents an unfair advantage over Appellants in business, among other things, and caused Appellants

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licenses that Defendants failed to develop or that should be otherwise revoked and/or had automatically terminated, and that are subject to ongoing administrative proceedings before the FCC. (SAC, ¶¶ 19, 29; Exhibit B to the SAC provides a list of these licenses.) Although "challenged" licenses have not been subject to any fact finding hearings by the FCC, the FCC routinely permits reconsideration upon discover of new evidence, such as that gathered in State Court proceedings. (SAC, ¶ 29, Vol. 6, AA01108-01109.)

to wrongly lose business opportunities. (SAC, ¶¶ 91-93; 56-60; 51-52; [Vol. 6, AA01135-36; 01121-1124; 1119-1120].)

**2. The Demurrers To The SAC**

On April 16, 2008 Respondent PSI filed its demurrer to the SAC (Vol. 6, AA01152-1253); and Respondent Mobex followed suit two days later (Vol. 7, AA01254-1280.) The grounds for the demurrers were very similar: both Respondents argued that the FCA preempts all of the causes of action in the SAC, and that the claims at issue were pled improperly. (Mobex Mem. at pp. 4-14, [Vol. 7, AA01268-1278]; PSI Mem. at pp. 3-8, [Vol. 6, AA01163-1168].)

**C. The Trial Court's Decision**

On May 12, 2008, the Superior Court held a hearing (Vol. 9, AA01952-1986) and ultimately sustained the general demurrer to the SAC and to each and every one of Appellants' 11 causes of action. (Vol. 9, AA01987-1997.) Specifically, the Court sustained Respondents' demurrers on the grounds that all of Appellants' claims fell "within the express preemption clause of the Federal Communications Act (FCA)." (Vol. 9, AA02089-91.) According to the Court, "[a]djudication of" all "the state claims pled in the SAC would necessarily implicate the regulation of "entry" into the mobile service market," per TPS Utilicom Services, Inc. v. AT&T Corp. (C.D. Cal. 2002) 223 F. Supp. 2d 1089. (3:5-8, Vol. 9, AA02089.) The Court concluded that, absent further administrative findings of liability, it lacked jurisdiction. (Id., at 3:21-27, Vol. 9, AA02089.)

In so holding, the Court explained that it mattered not whether the allegations supporting the

various claims were based on allegations other than those even relating to or touching upon the FCC or the FCA. For example, the Court ignored altogether the allegations of interference, namely, that Respondents actually solicited the breach of Petitioners' contracts. (SAC, ¶¶ 34, 99-106.) The Court further explained its ruling by stating that it was not clear "how" the state law claims were "related to the gist of the wrong being alleged in this action." (5/12/08 Tr. at 36:19-21; 37:5-8, [Vol. 9, AA01960-61]; [emphasis added].) Although Appellants' counsel pointed out that application of a "thrust" or "gist" of the complaint standard as applied to demurrers was inappropriate under California law, the Court nevertheless sustained the demurrer.

The Trial Court did not conduct a claim-by-claim analysis as required under Ball, supra. Nor did the Trial Court identify any allegations of the SAC that it concluded directly tread upon or second-guessed an FCC decision. (See, TPS Utilicom, supra, 223 F. Supp 2d at 1108; Fedor v. Cingular Wireless Corp. (7th Cir. 2004) 355 F. 3d 1069, 1072.) Indeed, the Trial Court applied a broader standard akin to "subject matter" preemption to disregard both the specific allegations and actual legal standard under Section 332.

Petitioners timely appealed from the Trial Court's May 12, 2008 decision.

**D. The Court Of Appeal's Decision**

In an unpublished decision filed on September 25, 2009, the Court of Appeal affirmed the trial court's dismissal of the SAC. According to the Court of Appeal, the "dispositive" question is whether the

"license warehousing scheme allegations upon which the causes of action are based intrude upon federal regulation of 'entry' to the market." (Op. at 19.) The Court's twofold error follows from ignoring key allegations in the complaint and then applying a sweeping and erroneous interpretation of federal preemption. Focusing almost entirely on the cancelled and ongoing licenses, Court held that the "distinction" Petitioners "attempt(ed) to draw between initial licensing and renewal, revocation, or termination of licenses is illogical and inconsistent with the purpose of section 332(c)(3)(A) to ensure uniformity in the law applicable to mobile service providers with respect to market entry." (Op. at p. 20.)

> A license is a prerequisite to market entry. As is the case with an initial grant of a license, a subsequent renewal, revocation or termination of a license determines access of the holder, and of other bidders or potential bidders to a license and the spectrum covered by it and therefore necessarily is also an issue of market entry. Uniformity in the regulation of market entry could not be achieved by limiting preemption of state regulation to the procedure, terms, and conditions for an initial grant of a license, yet allowing state regulation of the procedure and terms or condition with respect to the renewal, termination or revocation of licenses. (Op. at p. 20) (emphasis in original) (internal citations omitted).

The SAC alleged that Respondents committed well-recognized state tort violations by acquiring "both 'cancelled' and 'challenged' licenses with the intent to warehouse them, had retained them knowing that they failed to comply with FCC construction and coverage requirements." (Op. at p. 23.) It also alleged that Respondents committed intentional acts to interfere with Petitioners' contracts. (SAC, ¶¶ 34, 99-106, AA 01110-01111; AA 01136-01137.) Even so, the Court of Appeal decided that the SAC was based on licensing violations, and on that basis, affirmed.dismissal of all causes of action. (Op. at p. 23.) Repeating the Trial Court's error, the Court of Appeal failed to conduct a claim-by-claim analysis of each of the causes of action.

### E. The Petition For Rehearing And The FCC Petition For Declaratory Rulings

On October 13, 2009, Petitioners timely filed a Petition for Rehearing and Stay pending the outcome of a Petition for Declaratory Rulings with the FCC.

The Petition for Rehearing asked the Court of Appeal to reconsider its holding in three respects. First, the Petition for Rehearing pointed out that, without conducting an analysis of each of the claims at issue, the Appellate Court's Opinion assumes that all of the causes of action in the SAC uniformly sought to regulate the "procedure and terms or condition[s]" of "renewal, termination or revocation of licenses." (Op. at p. 20.) This is factually incorrect and ignores the legal mandate in cases like Ball, supra, 81 Cal. App. 4th 529: Each and every

cause of action must be evaluated before a court can rule it is preempted.

Second, the Opinion assumes that any cause of action based on the "revocation or termination" of a license issued by the FCC "necessarily is" or implicates an "issue of market entry." (Op. at p. 20.) This is a mistake of law that ignores the FCC's own ruling in WCA, surpa, 15 F.C.C. R.C.D. 17201 and the Second Appellate District's opinion in Spielholz, supra, 86 Cal. App. 4th 1366.

Third, the Court of Appeal implied that Appellants argue that 47 U.S.C. § 414 somehow "trumps" or preserves claims that are otherwise preempted under 47 U.S.C. § 332. (Op. at pp. 25-26.) This is not what Petitioners argued.

The Petition for Stay was filed because Petitioners are seeking, concurrently with the Petition for Rehearing, a ruling from the FCC a declaratory ruling to confirm that the narrow preemption standard articulated in WCA (a rate-setting case) applies with equal force to contentions of "market entry" preemption. (See, Petition for Writ of Supersedeas, Exh. A, Tab 6, and Request for Judicial Notice filed concurrently herewith.)

The time in which the Court of Appeals could have granted the Petition for Rehearing and Stay expired on October 26, 2009; Cal. R. Ct. 8.268(c). This Petition was timely filed on November 4, 2009.

## IV. REASONS FOR GRANTING REVIEW

### A. The Court Should Grant Review To Settle An Important Issue Of Law

Whether Section 332 preempts all claims based on licensing or incorporating licensing claims is an important issue facing all FCC licensees. If it

is true that Section 332 preempts all such claims, any rogue licensee will be able to disrupt an economic relationship between a valid license holder and a contractor, and then hide behind the cloak of preemption. This Court should not allow that to happen.

Indeed, the application of federal preemption in this case stands on head fundamental tenets and limitations of preemption articulated by this Court. (Betancourt, supra, 31, Cal. 4th at p. 22; In re Jose C. (2009) 45 Cal. 4th 534, 551, 554 (No federal preemption: presumption against preemption even in the immigration laws); Farm Raised Salmon Cases (2008) 42 Cal. 4th 1077, 1088-1091, 1098 (No federal preemption: "strong presumption" against preemption applies both to existence and scope of federal preemption); Viva! Internat. Voice for Animals, supra, 938-939 (No federal preemption: appellate court decision reversed to allow claims to proceed).)

> "There can be no doubt that the presumption applies with particular force here. (See Bronco Wine, supra, 33 Cal.4th at p. 974.) As the Court of Appeal acknowledged here, "[c]onsumer protection laws such as the [UCL], false advertising law, and CLRA, are within the states' historic police powers and therefore are subject to the presumption against preemption." Laws regulating the proper marketing of food, including the prevention of deceptive sales practices, are likewise within states' historic police powers. (Florida

> Avocado Growers v. Paul (1963) 373 U.S. 132, 144 [10 L. Ed. 2d 248, 83 S. Ct. 1210]." (Farm Raised Salmon Cases, supra, 42 Cal. 4th at 1088.)

The challenged Court of Appeal decision makes no reference to the strong presumption against preemption; its sweeping application of preemption runs contrary to this Court's decisions on other federal laws, and contrary to the FCC's own order in 2000 in the WCA decision.

**1. Review Is Necessary To Define The Purpose And Scope Of Section 332(c)(3)(A)**

First, to interpret Section 332(c)(3)(A) as precluding all claims based on or relating to licensing ignores the purpose of the federal statute, as well as fundamental principles of statutory construction. Section 47 U.S.C. § 332(c)(3)(A) is not intended to preclude all claims "based upon" or "relating to" licensing. Rather, the purpose of Section 332 is "to achieve nationwide uniformity in telecommunications regulation." (Bastien v. AT&T Wireless Services Inc., 205 F.3d 983, 988-989 (7th Cir. 2000).) In furtherance of this goal, Section 332 is drafted narrowly, and it stands in stark contrast to other preemption clauses, some of which seek to prevent a broader swath of activity. For example, the express preemption clause in the Airline Deregulation Act, (49 U.S.C.A. § 41713(b)(1)), contains statutory language of "unusual breadth" because it prohibits states from enacting or enforcing any law "'relating to rates, routes or services of any air carrier.'" (Altria Group, supra, 129 S. Ct. at 548)

(emphasis added). The phrase "relating to" has a broader scope than the preemption clause in other federal legislation, 47 U.S.C. § 332(c)(3)(A). Section 332(c)(3)(A) provides in part that "no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services." 47 U.S.C. § 332(c)(3)(A) (emphasis added). Interpreting Section 332(c)(3)(A) more broadly to bar all causes of action "relating to" or concerning interference with contracts and antitrust claims simply because the claims incorporate licensing allegations ignores the plain language of the statute and improperly broadens its scope.

The FCC's determination that Section 332 generally does not preempt state law claims for damages has recently been again relied upon to reverse a superior court's preemption ruling, with reasoning applicable here: "The Superior Court's conclusion cannot be reconciled with the second clause of section 332 (c)(3)(A), which expressly permits states to restrict the 'other terms and conditions of commercial mobile services' without regard to whether such terms and conditions may create hurdles or burdens attendant to participating in the market. We agree with the FCC's reasoning [in In re Wireless Consumers Alliance, Inc.]." (Murray v. Motorola, Inc. (October 29, 2009) 2009 D.C. App. LEXIS 547, *6, section IV.)

### 2. Review Is Necessary To Uphold Fundamental Principles Of Federalism

Second, to interpret Section 332 as broadly prohibiting all claims arguably "based on" licensing thwarts fundamental principles of federalism. To explain, "Congress' intent to preempt must be 'clear and manifest' to preempt state law in a field traditionally occupied by the states." (Spielholz, supra, 86 Cal. App. 4th at 1371-1372; Betancourt, supra, 31 Cal. 4th, at 1165, Wyeth, supra, 129 S. Ct at 1195 and n. 3.) "In other words, where federal law is said to bar state action in fields of traditional state regulation," courts work "on the assumption that the historic police powers of the State were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." (Betancourt, supra, 31 Cal. 4th at p. 1165.)[4]

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[4] *Wyeth* and other authority also makes clear that a relevant consideration in determining conflict preemption is the existence (or non-existence) of regulatory rules addressing the subject matter of the alleged preemption. In *Wyeth,* the Supreme Court court concluded that there was no federal preemption because, while the FDA had adopted specific standards for labeling, those standards permitted companies to update the labeling; the Court emphasized that the FDA had paid no more than "passing attention " to the question of the specific dangers of the medication raised in the litigation. (*Id.* at 1199.) Here, Respondents made no attempt to identify any FCC regulations purporting to address standards or procedures adopted by the FCC to address antitrust claims or contractual interference claims, nor are there any such FCC regulations. On the contrary, claims for damages fall with the "other terms and conditions" left to state regulation.

States have traditionally regulated the area of intentional interference or interference with contracts and other business torts, and Section 332 does not express a clear intent to abrogate this area of law. This is important here because the SAC contains a cause of action for intentional interference with contracts that the Appellate Court ignored outright in its Opinion. That cause of action is grounded in the allegations that Appellees interfered with the Kurian and NUSCO contracts, two valid contracts that Appellants had and could not follow through on because Appellees induced a specific individual to breach a specific contract:

> (a) in the matter of the Kurian Contract, ... [PSI and MCLM]
>
> (i) caus[ed] ... the former wife of T. Kurian to make false and otherwise baseless claims, including that T. Kurian ... held, individually, free and clear title to a certain FCC AMTS license and had legal authority to enter the Kurian Contract to assign said license to ACL ... ;
>
> (ii) mak[e] false statements to T. Kurian, including about ACL, that ... caused him to breach provisions in the Kurian contract; and
>
> (b) In the matter of the NUSCO Contract, ... PSI with cooperation from MCLM, ... [made] false claims to NUSCO and other parties of alleged encumbrances in a certain FCC AMTS

> license held by ACL that AC agreed to assign to NUSCO under the NUSCO Contract. ... AA 01110-0111; 01136-01137.

These allegations do not directly challenge an FCC determination, have nothing to do with the "procedure and terms or condition[s]" of "renewal, termination or revocation of licenses," and in no way implicate FCC regulation of entry into the marketplace. Op. at p. 20. Indeed, the allegations are most clearly not preempted because they say nothing about Appellees' licenses, revoked or otherwise. Rather, these claims are grounded in Appellees' false representations to third parties that interfered with Appellants' ability to conduct business. Breach of contract and interference of contract claims are unquestionably areas in which the States have traditionally provided remedies, not the FCA. The allegations are indistinguishable from the false advertising claims in Ball – claims that the trial court erroneously dismissed under section 332, and that were then Reinstated on appeal. (Ball, supra, 81 Cal. App. 4th at p. 543.)

Even where the FCC itself attempts to assert federal preemption of actual state regulation (as distinguished from traditional tort claims for damages), the presumption against preemption will weigh in favor of no federal preemption. (State of California v. Federal Communications Commission (9th Cir. 1990) 905 F.2d 1217, 1239-1240 [FCC's preemption order vacated where language of statute did not support "cramped reading" of preemption of

state's regulation of "intrastate telephone network".)[5]

### 3. Review Is Necessary To Preserve Traditional State Law Claims

Finally, the Court of Appeal's Opinion guts antitrust and licensing policies designed to protect licenses from unfair business practices such as those committed by Respondents in this case. As a matter of policy, Congress expressly provided that antitrust laws would "coexist" with FCC regulation of rates and market entry. (Covad Communications Co. v. Bell-South Corp. (11th Cir. 2002) 299 F.3d 1272, 1282.) Put differently, "nothing" in the FCA "shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws." (Verizon Communications, Inc. v. Trinko (2004) 540 U.S. 398, 406 ("Trinko").); 110 Stat. 143, 47 U.S.C. § 152, note 5 (1996).)[6] This is because "the legislative history surrounding the 1996 Act, reflect[s] that the President, the Congress, the Department of Justice and the FCC have emphasized the critical need for the antitrust laws to work in conjunction with the 1996 Act in order to spur competition in the telecommunications industry." (Covad, supra, 299 F. 3d at p. 1281.)

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[5] Petitioner's claims here also rest expressly on "intrastate" conduct. (SAC, ¶¶ 7, 10, 11.)

[6] Notes have the same legal effect as the laws they explain. Richard McKinney, Law Librarians Society of DC, Legislative Sourcebook, United States Code Historical Outline and Explanatory Notes (2008), http://www.llsdc.org/attachments/wysiwyg/544/US-Statutes-Outline.pdf.

The policies underlying the antitrust laws and licensing laws are complimentary. As one court has explained, "[a]lthough technically the FCA focuses on public necessity and convenience and the Sherman Act on competition, in a very real sense both the FCC, in its enforcement of the [FCA], and the courts, in their application of the antitrust laws, guard against unfair competition and attempt to protect the public interest." (United States v. American Tel. and Tel. Co. (D.C.D.C. 1980) 498 F.Supp. 353, 364.) Indeed, the licensing laws the FCA are intended to "regulat[e]" access to "interstate and foreign commerce in communication by wire and radio," (47 U.S.C. § 151), to allow the FCC control "over all the channels of radio transmission" and "to provide for the use of such channels ... by persons for limited periods of time, under licenses granted by Federal authority." (47 U.S.C. § 301 [emphasis added].) The "Cartwright Act declares as its ultimate purpose 'to promote free competition in commerce and all classes of business in this state.'" (The State of California ex rel. Van De Kamp v. Texac, Inc., (1988) 46 Cal.3d 1147, 1184 [citing Stats. 1907, ch. 530, tit., p. 984], (emphasis omitted) superseded by statute on other grounds, Cal. Bus. Prof. Code, § 17200. Likewise, the sole purpose of the antitrust laws "is to protect competition." (Gordon v. New York Stock Exchange, Inc. (1975) 422 U.S. 659, 689; Covad, supra.)

Stated another way, the Cartwright Act (and antitrust laws generally) are the corollary or flip side to licensing laws. (See, discussion in Covad, supra, 299 F. 3d at pp. 1280-1282 [antitrust laws work "in conjunction with the 1996 Act" to "spur competition"].) Together, licensing laws and

antitrust laws work to ensure the regulation and promotion of free enterprise, and the prevention of exactly what happened here: The unlawful warehousing and hoarding of licenses so as to create an unlawful monopoly on a particular market – the use and monopolization of licenses for longer than the period of time allotted by the FCC license.

In summary, the Court should grant review to settle the important legal issue of whether traditional state law claims, such as interference with contract and antitrust violations, are barred under Section 332 (c)(3)(a).

### B. The Court Should Grant Review To Secure Uniformity Of Decision Among The Appellate Courts

Prior decisions of the Courts of Appeal in Ball and Spielholz instruct that, when faced with a claim of preemption under section 332, courts must analyze each claim in the complaints at issue and determine whether each of the claims are preempted. This is a fact-intensive analysis, turning on the remedies sought as well as the allegations in each complaint.

The Court of Appeal in this case did not follow the Ball and Spielholz directive. Instead, the Court of Appeal determined that all of the claims were barred simply because they were based on licensing and involved torts committed during the time in which Respondents held the licenses or because Respondents failed to surrender licenses. This holding ignores specific allegations and specific causes of action, such as the cause of action for intentional interference with contracts. (SAC, ¶¶ 34, 99-106; AA 01110-01111; AA 01136-01137.)

This creates a conflict among the appellate courts. The risk of an over broad, over zealous application of the preemption doctrine is highlighted in a case like this one, where good claims get thrown out with others that may or may not be preempted. Again, Petitioners cite the example of the interference with contract claims in the SAC: If all of the licensing allegations were eliminated from the SAC, those claims could stand on their own. They are entirely unrelated to licensing, and would give rise to a valid cause of action that state courts regularly adjudicate. Given the importance of the issues at stake, the Court should grant review to secure uniformity of decision among the appellate courts.

## V. CONCLUSION

For the reasons set forth above, the Court should grant review and reverse. The Appellate Court's decision disregards fundamental tenets of federal preemption, including the strong presumption against preemption, the need for a claim-by-claim analysis, the burden on the party invoking preemption, and this Court's recent holdings in similar contexts. Alternatively, the accompanying Writ of Supersedeas should issue pending the outcome of related proceedings before the FCC -- proceedings in which the FCC has been asked to declare that the FCC's decision in WCA in 2000 against preemption under section 332 for "rates" applies with equal force to "market entry."

Dated: November 4, 2009

By: /s/ PATRICK J. RICHARD
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